

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL
76-7267

United States Court of Appeals
FOR THE SECOND CIRCUIT

NORMANDY MANUFACTURING CORP., L. CLAUSE, S.A., COMPAGNIE D'ASSURANCES LA NEUCHÂTELOISE, S.A. HANSEN AND CO., JAGENBERG OF CANADA, BILTMORE HATS, LTD., P.I.E. TRANSPORT, INSURANCE COMPANY OF NORTH AMERICA, COMPAGNIE D'ASSURANCES LA PATERNELLE, THE AMERICAN IMPORT COMPANY, SOCIÉTÉ DE PRODUITS CHIMIQUES INDUSTRIELS, COMPAGNIE D'ASSURANCES LES ASSURANCES NATIONALES I.A.R.D., T. RIVOIRE AND FILS, ALLIANZ S.A., S'ASSURANCES, ADIDAS S.A.R.L., THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED, MICHELAN AND CO., PHILIPPE MARTIN ASSUREUR MARITIME, ALSTHOM-SAVOISIENNE, COMPAGNIE D'ASSURANCES LA C.A.M.A.T., CIE HELVETIA SAINT GALL, L'ITALIA, COMPAGNIE AUX DE PARFUMES INC., SIMMONS LIMITED, QUEBEC LIQUOR CORPORATION, HEINRICH EQUIPMENT CORP., DIVISION OF C.T.S. SALES, INC., FIREMAN'S FUND AMERICAN INSURANCE COMPANY, THE HOME INSURANCE COMPANY, TELEFONAKTIEBOLAGET L. M. ERICSSON, SJOFORSKRINGSAKTIEBOLAGET HANSA, WALTER AND ZANGER INC. and PITT and SCOTT,

Plaintiffs-Appellants,

against

ATLANTIC CONTAINER LINE LTD. and CIE GENERALE TRANS-ATLANTIQUE, SWEDISH AMERICAN LINES and WALLENIUS LINES, d/b/a CARE LINE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



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Excerpts From Docket Entries.

74 Civ. 263

DATE

PROCEEDINGS

Jan. 15-74	Filed complaint and issued summons.
Feb. 4-74	Filed summons with marshals return. Atlantic Container Line by M. Renina. 1-17-74. Cie Generale Transat. by A.J. Vernuealn 1-22-74. Swedish American Lines by O.Y. Peterson 1-21-74. Wallenius Lines by Mr. Ingarto 1-22-74.
May 20-74	Filed ANSWER to complaint by deft's Care Line.
Jul. 15-74	Filed plttf's interrogs.
Jul. 31/74	Filed memo. of law in support of motion for summary judgment dismissing the complaint as to deft. Atlantic Container Line Ltd.
Jul. 31/74	Filed defts.' notice of motion re: summary judgment ret: 8/9/74. (Atlantic)
Jul. 31/74	Filed memo. of law in support of motion for summary judgment dismissing the complaint as to defts. CIE. Generale Transatlantique Swedish American Lines, and Wallenius Lines.
Jul. 31/74	Filed defts.' notice of motion re: summary judgment ret: 8/9/74. (CIR Generale Transatlantique, Swedish American Lines, and Wallenius Lines, etc.)
Sep. 12-74	Filed deft's reply memorandum in support of motions for summary judgment.
Sep. 12-74	Filed affidavit of Martin B. Mulroy in opposition to motion for summary judgment.
Sep. 12-74	Filed plttf's memorandum of law in opposition to motion for summary judgment.

DATE

PROCEEDINGS

- Sep. 12-74 Filed answering affidavit of Martin B. Mulroy in opposition to motion, for summary judgment.
- Sep. 12-74 Filed Atlantic Container Lines memorandum of law in opposition to, motion for summary judgment.
- Sep. 13-74 Filed deft's supplementary reply memorandum in support, of motions for, summary judgment.
- Oct. 1-74 Filed MEMO DECISION & ORDER #41248: ACL'S MOTION FOR SUMMARY JUDGMENT will be deferred pending the outcome of the specified areas of discovery which will be referred to Magistrate Jacobs for, supervision. Since all parties agree that deft. Care Line's motion to dismiss on grounds of forum non conveniens should, be dependent on the outcome of ACL'S summary judgment motion, the court will also defer action on that motion until the, ordered discovery is completed. So ordered. Knapp, J. m/n
- Dec. 11-74 Filed deft's answers to interogs propounded by plttf's.
- 02-05-75 Filed defts.' suppl. answer to interogs. of plttf.
- 03-03-75 Filed plttf's notice to take deposition of deft. Atlantic Container.
- 06-03-75 Filed plttf's memorandum of law.
- 10-02-75 Filed deft's application for decision on referred motions for summary judgment.
- 10-15-75 Filed Deposition of deft. Atlantic Container Line taken on 2-14-75.
- 10-15-75 Filed deposition of deft. Atlantic Container Line taken on 2-13-75.
- 03-02-76 Filed deposition of deft. CIE General Trans., Swedish American Line & Wallenius Lines d/b/a Care Line taken on 9-11-75.

DATE	PROCEEDINGS
03-10-76	Filed Memorandum of law in opposition to deft's motion for summary judgment & in support of a cross-motion for summary judgment on behalf of plttf's.
03-10-76	Filed plttf's affidavits in opposition to motion for summary judgment.
03-17-76	Filed deft's reply memorandum Re: deft's motion for summary judgment.
03-17-76	Filed stip & order that deft's motion for summary judgment having been deferred, pending completion of discovery, now has been completed & may now be restored to calendar, & placed on motion calendar on April 23, 1976. Knapp, J.
04-20-76	Filed deft's statement under rule 9(g) as to plttf's motion for summary judgment.
06-01-76	Filed JUDGMENT—Ordered that the complaint is dismissed on the merits as against deft. Atlantic Container Line Ltd. that against defts. Cie Generale Transatlantique, Swedish American Lines, and Wallenius Lines the complaint is dismissed on the ground of forum non conveniens, etc. and that costs be taxed in favor of defts. against plttfs. Knapp, J. m/n Judgment entered 6-1-76 Clerk
06-04-76	Filed plttf's notice of appeal to the USCA from order dismissing complaint entered. 6-01-76 Mailed copy to Haight Gardner Poor & Havens.

**Defendants' (Other Than Atlantic Container
Line, Ltd.) Notice of Motion.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORMANDY MANUFACTURING CORP., et al.,
Plaintiffs,
—against—
ATLANTIC CONTAINER LINE LTD, et al.,
Defendants.

MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT
AS TO DEFENDANTS CIR. GENERALE TRANSATLANTIQUE,
SWEDISH AMERICAN LINES, AND WALLENIUS LINES, d/b/a
CARE LINE

PLEASE TAKE NOTICE that on the annexed affidavits of Bengt Erik Holtzberg, sworn to on the 28th day of June, 1974 and Richard G. Ashworth, sworn to on the 30th day of July, 1974, and on the complaint and answer herein, defendants Cie. Generale Transatlantique, Swedish American Lines, and Wallenius Lines, d/b/a Care Line, will move this Court at a Motion Term thereof, to be held before the Honorable Whitman Knapp, U.S.D.J., at the United States Court House, Foley Square, on the 9th day of August, 1974, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure,

*Defendants' (Other Than Atlantic Container Line, Ltd.)
Notice of Motion.*

for summary judgment dismissing the complaint as to
said defendants.

Dated: New York, N. Y., July 30, 1974.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
By RICHARD G. ASHWORTH
Attorneys for Defendants

To: MESSRS. HILL, RIVKINS, CAREY,
LOESBERG & O'BRIEN
96 Fulton Street
New York, N. Y. 10038
Attorneys for Plaintiffs

**Defendant Atlantic Container Line Ltd.'s Notice
of Motion.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT
AS TO DEFENDANT ATLANTIC CONTAINER LINE LTD.

PLEASE TAKE NOTICE that on the annexed affidavits of Bengt Eric Holtzberg, sworn to on the 28th day of June, 1974, Joran Bohm, affirmed on the 2nd day of July, 1974, and Richard G. Ashworth, sworn to on the 30th day of July, 1974, and on the complaint and answer herein, defendant Atlantic Container Line Ltd. will move this Court at a Motion Term thereof, to be held before the Honorable Whitman Knapp, U.S.D.J., at the United States Court House, Foley Square, on the 9th day of August, 1974, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the complaint as to said defendant.

Dated: New York, N. Y., July 30, 1974.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
By RICHARD G. ASHWORTH
Attorneys for Defendants

To: MESSRS. HILL, RIVKINS,
CAREY, LOESBERG & O'BRIEN
96 Fulton Street
New York, N. Y. 10038
Attorneys for Plaintiffs

**Statement Under S.D.N.Y. Rule 9(g) by Defendant
Atlantic Container Line Ltd.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

DEFENDANT ATLANTIC CONTAINER LINE LTD.'S MOTION
FOR SUMMARY JUDGMENT

Defendant contends there is no genuine issue to be tried as to the following material facts:

(1) The contracts of carriage for the cargo sued upon are subject to the Hague Rules, which provide that the carrier shall not be responsible for loss resulting from fire unless caused by the actual fault or privity of the carrier.

(2) Defendant Atlantic Container Line Ltd. was the carrier of said cargo.

(3) Said cargo was carried in containers stowed on the weather deck of the m/v Mont Laurier.

(4) Said cargo was destroyed as a result of a fire which broke out in the trailer deck of the m/v Mont Laurier.

(5) Defendant Atlantic Container Line Ltd. was time-charterer of the on-deck space of the m/v Mont Laurier, which was manned, equipped, supplied and operated by others.

(6) On deck stowage was not a deviation and was not a cause of the fire.

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*Statement Under S.D.N.Y. Rule 9(g) by Defendant
Atlantic Container Line Ltd.*

(7) Defendant Atlantic Container Line Ltd. had no connection with or knowledge of the cause of the fire.

Dated: New York, N. Y., July 30, 1974

HAIGHT, GARDNER, POOR & HAVENS
By RICHARD G. ASHWORTH
Attorneys for Defendants

To: MESSRS. HILL, RIVKINS,
CAREY, LOESBERG & O'BRIEN
96 Fulton Street
New York, N. Y. 10038
Attorneys for Plaintiffs

**Plaintiffs' Statement Under S.D.N.Y. Rule 9 (g) as to
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Plaintiff claims there is no genuine issue to be tried as to the following facts:

1. Defendant ACL is a carrier under the bills of lading issued having the non-delegable duty to make the ship seaworthy and to make "all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation."
2. Defendant ACL entered a space charter with other defendants known as Care Line in a Memorandum of Understanding under the terms of which ACL did not retain the power to personally perform their non-delegable duties.
3. Under the terms of the Memorandum of Understanding the Care Line defendants performed for ACL all carrier functions from delivery of plaintiffs' cargo to the Care Line terminal on a "gate to gate" basis.
4. ACL has not come forward with any evidence to rebut, contradict or reveal factual data relevant to the cause of the fire other than to deny that there was improper stowage.
5. The person who had responsibility to prevent stowage of incompatible cargo was Captain Goby, an employee of CGT.

*Plaintiffs' Statement Under S.D.N.Y. Rule 9(g) as to
Plaintiffs' Motion.*

6. CGT is, in addition to being a defendant as a partner in Care Line, a General Agent for Care Line and A.C.L., but a controlling stockholder-director of ACL.

7. The cause of the fire was the improper stowage of incompatible cargo on the B deck or trailer deck of the Mont Laurier by Care Line.

Dated: New York, New York
April 14, 1976

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
By:

MARTIN B. MULROY
Attorneys for Plaintiffs
Office and P.O. Address
96 Fulton Street
New York, New York 10038

To: HAIGHT, GARDNER, POOR & HAVENS, Esqs.
Attorneys for Defendants
Office and P.O. Address
One State Street Plaza
New York, New York

**Plaintiffs' Amended Statement Under S.D.N.Y.
Rule 9 (g) as to Defendants' Motion.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Plaintiffs agree with Defendants' Statement under Rule 9 (g) submitted with original motion as to items 1, 2, 3, 4, 5 and 6.

7. Defendant ACL claims it has no connection with or knowledge of the cause of the fire (and both parties agree the vessel was manned, equipped, supplied and operated by others in item 5).

Plaintiff takes issue with ACL on its connection with and knowledge of the cause of the fire as a matter of law on the basis that ACL being a carrier under the ACL bill of lading has a non-delegable duty for the safety of plaintiffs' cargo even though ACL did not operate the vessel and on the basis of the Care Line activities and non activities being imputed to ACL as managing agents.

Dated: New York, New York

April 14, 1976

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN

By:

MARTIN B. MULROY

Attorneys for Plaintiffs

Office and P.O. Address

96 Fulton Street

New York, New York 10038

To: HAIGHT, GARDNER, POOR & HAVENS, Esqs.

Attorneys for Defendants

Office and P.O. Address

One State Street Plaza

New York, New York

**Defendant's Statement Under S.D.N.Y. Rule 9(g)
as to Plaintiffs' Motion for Summary Judgment
Against Defendant ACL**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

The first mention of summary judgment in favor of plaintiffs against defendant ACL appears in Cargo's memorandum submitted on March 10, 1976, in which the only references appear in the title and in the second paragraph of the conclusion. No written motion has been filed.

At the conference in Chambers on March 17th the Court inquired as to this question of summary judgment for plaintiffs. At that time counsel for Cargo apparently agreed that there were genuine issues of fact material to plaintiffs' cause of action (assuming the Fire defense, on which ACL has moved for summary judgment, fails). The factual issues include whether:

- (1) the Mont Laurier was seaworthy;
- (2) the stowage was proper;
- (3) the fire was not caused by the actual fault or privity of Care Line;
- (4) ACL was a true corporation.

The negative of the foregoing four items is assumed for the purpose of ACL's motion for summary judgment, since none of these assumed "facts" is material or relevant to the carrier's Fire defense, which as a matter of law turns on the carrier's "actual fault or privity". These four items are, however, both material and in issue insofar as con-

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*Defendant's Statement Under S.D.N.Y. Rule 9(g) as to
Plaintiffs' Motion for Summary Judgment Against
Defendant ACL.*

cerns Cargo's claim, and plaintiffs are therefore not
entitled to summary judgment.

April 19, 1976

HAIGHT, GARDNER, POOR & HAVENS
By RICHARD G. ASHWORTH
Attorneys for Defendants
One State Street Plaza
New York, N. Y. 10004

Plaintiffs' Interrogatory No. 3.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

INTERROGATORIES OF PLAINTIFFS PROPOUNDED
TO ALL DEFENDANTS

* * *

3. State:

(a) The name and address of each person relied upon by Atlantic Container Line Ltd. for (i) the proper stowage of all on-deck goods, (ii) the proper stowage of all other goods stowed on board the vessel, (iii) an examination of all dangerous and other cargo carried anywhere on board the vessel, (iv) the safety of the vessel in connection with all fire fighting equipment, (v) the exercise of due diligence to make the vessel in all respects seaworthy, (vi) the nature and characteristics of the cargo accepted for transport on the vessel, indicating as to each the particular stated area on which such person was relied upon.

(b) The name and address of each person relied upon by Care Line for (i) the proper stowage of all on-deck goods, (ii) the proper stowage of all other goods stowed on board the vessel (iii) an examination of all dangerous cargo carried anywhere on board the vessel, (iv) the safety of the vessel in connection with all fire fighting equipment, (v) the exercise of due diligence to make the vessel in all respects seaworthy, (vi) the nature and characteristics of the cargo accepted for transport on the vessel, indicating as to each the particular stated area on which such person was relied upon.

Plaintiffs' Interrogatory No. 3.

(c) Indicate if any of the parties referred to in answer to (a) or (b) were ever or are now employed by or under the direction of the owner of the SS MONT LAURIER, Cie. Generale Transatlantique, Wallenius Lines, Swedish American Line and Cunard Steamship Company, Ltd., Holland America Line, Swedish Trans-Atlantic Line indicating which companies as to each.

(d) Indicate the name of all expert witnesses, surveyors, investigators and technicians employed by A.C.L. and Care Line indicating if they were jointly engaged or by whom if severally engaged.

(e) Detail their opinions and what each will testify to if called as witnesses, and what purported facts they base their opinions on.

(f) indicate the name of all persons from whom statements have been obtained whether written or oral, indicating the employment of the person giving the statement and the person obtaining it, and setting forth its content.

* * *

Defendants' Answer to Interrogatory No. 3.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

**DEFENDANTS' ANSWERS TO INTERROGATORIES
PROPOUNDED BY PLAINTIFFS**

* * *

3. (a) Pursuant to the Memorandum of Understanding dated March 6, 1972 (which was identified by affidavit in support of ACL's motion for summary judgment), ACL relied upon Care Line for all of the matters listed in subparagraphs (i) through (v). As to subparagraph (vi), ACL relied on its advisory subsidiary, Atlantic Container Line Services, Ltd. (hereinafter ACL Services) in Southampton, which in turn relied on agents in each port for the booking of ACL container cargo on Care Line vessels. In Gothenburg the agent was Atlantic Container Line AB, Box 888, 402 72 Gothenburg 8; in Bremen, Gottfried Steinmeyer & Co., Schlachte 19/20, P. O. Box 121, D-2800 Bremen 1; in Rotterdam, Incotrans, Burg Breebaartlaan 2, Poortugaal, Rotterdam; in LeHavre, CGT, 98 Boulevard de Strasbourg, P. O. Box 1355, F-76065 Le Havre; in Montreal, Atlantic Container Line (Canada) Limited, St. John's Street, 465 Montreal.

(b)(i) and (ii) Stowage was under the general coordination of CGT's Capt. Rene Goby, Quai de l'Europe, F-76600 Le Havre, and his assistants. Care Line relied for proper stowage upon local terminal managers, stevedoring companies in each port, and the ships' personnel. In Gothenburg the terminal manager was Capt. Olle Johansson, of Atlantic Container Line AB, and the stevedore was Skandiaterminalen AB, Stilla Havet, Skandiahamnen,

Defendants' Answer to Interrogatory No. 3.

417 34 Gothenburg H; in Bremen the terminal manager was Captain Enno Wulff, employed by the stevedore, Atlantik Stauerei Geuther & Schnittger, Container Terminal Nordhaven, Gate House, 285 Bremerhaven; in Rotterdam the terminal manager was Capt. Alf Bodde, of Broekman Motorships, and the stevedore was Unitcentre, Heijplaat, Rotterdam; in Le Havre the terminal manager was Capt. Goby and the stevedore was GAMAC, Quai de l'Europe, F-76600 Le Havre; and in Montreal the terminal manager was Capt. M. Wace, of Atlantic Container Line (Canada) Ltd., and the stevedore was Logistec Corporation, 276 St. Jacques, Suite 901, Montreal 126.

(b)(iii) and (vi) Care Line relied upon local terminal managers and the booking agents in each port to ascertain the nature and characteristics of the cargo. In Scandinavia the booking agent was SAL and its sub-agent subsidiary in Gothenburg (owned 50/50 by SAL and Transatlantic) Atlantic Container Line AB; in Bremen the booking agent was Karl Geuther & Co. P.O. Box 1924, Martini-strasse 58, D-28 Bremen, who in turn relied upon information and documents furnished by chemical forwarders Lexsau, Scharbau & Co., Kap Horn Strasse 21, 28 Bremen, to ascertain the nature of chemical shipments; in Rotterdam the booking agent was Incotrans; in Le Havre the booking agent was CGT; in Montreal the booking agents were Atlantic Container Line (Canada) Ltd. and Colley Motorships Limited, 1015 Beaver Hall Hill, Montreal 128.

(b)(iv) and (v) Care Line relied upon the owner of each vessel for the safety of her fire fighting equipment and the exercise of due diligence to make her seaworthy.

(c) no, except for SAL and CGT, as indicated above.

(d), (e), and (f) irrelevant to privity.

* * *

**Extract From Defendants' Supplementary Answer
to Interrogatories.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

DEFENDANTS' SUPPLEMENTARY ANSWER TO INTERROGATORIES

1. The correct name of the owner of the Mont Laurier is Compagnie Atlantique Maritime (hereinafter "CAM"), a French corporation 75% of whose stock was owned by defendant CGT and 25% by defendant Wallenius. Prior to the delivery of the Mont Laurier by her builders in the Spring of 1972, defendants CGT and Wallenius entered into an arrangement with CAM whereby CGT and Wallenius would timecharter the Mont Laurier and her subsequent sister ship, Mont Louis, and CGT would manage and operate the vessels for CAM. These arrangements had not yet been incorporated in written contracts, the details of which were still under negotiation, at the time of the Mont Laurier fire. CAM had no contract or agreement of any kind with Care Line or with ACL. The Care Line organization is set forth in a Basic Agreement dated April 19, 1972, copy of which is attached hereto.

Memorandum and Order of September 27, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

41248

KNAPP, D.J.

Defendant, Atlantic Container Line Ltd. (ACL), seeks summary judgment against Normandy Manufacturing Corp., et al. the plaintiffs in this admiralty action to recover damages for the loss of cargo destroyed in January, 1973 by fire aboard the M/V Mont Laurier. This motion should be deferred at this time in order to afford plaintiffs an opportunity to have discovery solely on the issue of whether the fire which destroyed the cargo was caused "by the actual fault or privity" of ACL.

All parties agree that the relationship between plaintiffs and defendant ACL is that of shipper and carrier. ACL space chartered the weather deck of the M/V Mont Laurier for the carriage of plaintiffs' goods, and such cargo was carried in containers on the weather deck of the ship. While on route from Le Havre, France to Montreal, Canada a fire broke out on the trailer deck of the ship and the cargo was destroyed.

Both parties agree that the applicable law is the Hague Rules, which provide in Article IV, Section 2 that:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

* * *

- (b) Fire, unless caused by the actual fault or privity of the carrier."

Memorandum and Order of September 27, 1974.

This exemption from liability is identical to the one found in the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(2)(b).

ACL maintains that plaintiffs cannot possibly show "actual fault or privity" on the part of the carrier ACL because ACL had nothing to do with the Mont Laurier's underdeck cargo, the area in which the fire broke out. It is well settled as a matter of law that to establish liability for fire the privity or fault must be that of the carrier itself. "Negligence on the part of the master, any crew member or agent is not imputed to the owner." *Asbestos Corp. Ltd. et al. v. Compagnie de Navigation Fraissinet et Cyprien Fabre et al.* (S.D.N.Y. 1972) 345 F. Supp. 814, 820, *aff'd.* (with opinion) 480 F.2d 669. ACL thus claims that since the fire broke out in an area which was the responsibility of the other defendant in this action (a joint service known as Care Line), as a matter of law, plaintiffs cannot show "actual fault or privity."

Plaintiffs, however, maintain that the relationship between ACL and Care Line is such that the acts of Care Line can be attributed to ACL for the purpose of privity and knowledge with regard to the alleged negligent storage of cargo on the tractor deck. Plaintiff points to the common ownership of the two defendants and to a "Memorandum of Understanding" between ACL and Care Line, dated March 6, 1972, which refers to the parties as "partners". If plaintiffs could show that the fire was caused by the fault of managing agents to whom ACL delegated the task of inspection, decisions on precautions and the like, that fault could be imputed to ACL. See *Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre et al.*, *supra*, 345 F. Supp. 814, 820 and cases cited.

Although it does not appear that the Memorandum of Understanding alone would establish such a relationship between the two defendants, plaintiffs should have an op-

Memorandum and Order of September 27, 1974.

portunity to take discovery on the issues of the relationship of the two defendants and the relative responsibilities of the two with respect to the operation of the M/V Mont Laurier.

Accordingly, ACL's motion for summary judgment will be deferred pending the outcome of the specified areas of discovery, which will be referred to Magistrate Jacobs for supervision.

Since all parties agree that defendant Care Line's motion to dismiss on grounds of forum non conveniens should be dependent on the outcome of ACL's summary judgment motion, the court will also defer action on that motion until the ordered discovery is completed.

So ORDERED.

Dated: New York, New York
September 27, 1974.

WHITMAN KNAPP, U.S.D.J.

Excerpts From Deposition of Philip Edward Bates.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Deposition of defendant Atlantic Container Line Ltd., by Phillip Edward Bates taken by plaintiff, pursuant to agreement, at the offices of Hill Rivkins Carey Loesberg & O'Brien, Esqs., 96 Fulton Street, New York, N. Y. 10038, on February 13, 1975, at 2:00 p.m., before Arlene Baker, a Shorthand Reporter and Commissioner of Deeds of the City of New York.

APPEARANCES:

HILL RIVKINS CAREY LOESBERG &
O'BRIEN, Esqs.,

Attorneys for Plaintiff,
96 Fulton Street,
New York, N. Y. 10038

By: MARTIN B. MULROY, Esq.,
Of Counsel

HAIGHT GARDNER POOR & HAVENS, Esqs.,
Attorneys for Defendant,

One State Street Plaza,
New York, N. Y. 10004

By: RICHARD G. ASHWORTH, Esq.,
Of Counsel

* * *

(3) PHILIP EDWARD BATES, called as a witness, being first duly sworn by the Commissioner of Deeds (Arlene Baker), was examined and testified as follows:

Excerpts From Deposition of Philip Edward Bates.

Examination by Mr. Mulroy:

Q. Would you state your name and address for the record. A. Philip Edward Bates; home address?

Q. Home address. A. Friars Wood, Pilley Hill, Lymington, Hampshire, UK.

Q. Do I understand that you are presently associated with Atlantic Container Line Services, Ltd.? A. I work for that company.

Q. In what capacity do you work for that company? A. Chairman.

Q. Would chairman be roughly the British equivalent of the president of an American corporation? A. Yes.

Q. Is that company an affiliate of Atlantic Container Line Ltd.? A. It is a wholly owned subsidiary of the Atlantic Container Line Ltd.

(4) * * * Q. Prior to your connection with Atlantic Container Line Services, Ltd., by whom were you employed? A. Cunard Steamship Company, Ltd.

* * *

(5) * * * Q. What position did you occupy with Cunard prior to leaving that corporation? A. Managing director of Cunard Line, Ltd., director of the main board of Cunard Steam, and deputy chairman of Cunard Steam.

* * *

Q. What was the manner in which the negotiations came about that Cunard joined Atlantic Container Line Ltd., (6) what were the mechanics by which this came about, in your parlance? A. Well, Cunard had evaluated its situation in the North Atlantic and decided to apply to Atlantic Container Line Ltd. to join as a shareholder and participant in ACL.

* * *

Q. What was the view that came out, what was the conclusion of this evaluation of the Cunard service? A. Well,

Excerpts From Deposition of Philip Edward Bates.

we evaluated not only Cunard services, but the total situation in the North Atlantic in that (7) point in time and concluded that the best solution for Cunard would be to join Atlantic Container Line.

Q. Solution to what; what was the problem to which the joining of Atlantic Container Line was the solution?

I am not clear on the problem that prompted you to join ACL. That's the area of my inquiry. A. You must appreciate that the operation of container vessels and all the equipment that goes with them is a very highly capital intensive operation. The North Atlantic is a well known highly competitive market and it therefore seemed prudent to join forces with others rather than go it alone.

Q. In the course of Cunard joining forces with others, would this necessarily take Cunard out of the container market in this area on its own? A. In respect to the North Atlantic, yes.

Q. Did Cunard, when it went into this operation, continue to solicit and book freight but do so through the Atlantic Container Line rather than on Cunard vessels? A. Cunard became the general agent in the United Kingdom for Atlantic Container Line and therefore responsible for booking all cargo, which are then shipped on an ACL bill of lading.

Q. Is this the general arrangement that Atlantic (8) Container Line has with the partners or members? A. Yes, it is.

* * *

(9) Q. Is the percentage that Cunard obtains for booking cargo from the UK the same percentage that the other participants obtain for booking cargo on ACL vessels out of their particular agency? A. Yes, except in respect of our American office which is a branch office and is wholly owned, and therefore, there is no commission.

Q. Was the percentage payable to the participants as booking agents determined prior to Cunard's entry into

Excerpts From Deposition of Philip Edward Bates.

the Atlantic Container Line Ltd. organization? A. Basically, yes, but it had been altered since.

Q. What is the instrument or document that would contain or embody the alteration of the booking arrangement or percentage? A. It would be a minute of one of the principal committee meetings.

By principal, again, I mean shareholder or partner.

* * *

(10) * * * Q. In connection with the shareholders meetings, are they meetings that are attended by J. Ribiere on behalf of CGT? A. Yes, normally.

* * *

(14) * * * Q. When a proposition is brought before the committee, is it your experience that that proposition has been previously discussed between or among all or some of the members prior to it being formalized before the committee? A. Generally not.

Q. Have there been instances where it has? A. Yes, the Care Line one is a particular one.

* * *

(15) * * * Q. Is there a requirement for committee members having a vote that a period of time elapse between the introduction of a policy change proposal and its adoption to committee members to consult their principals? A. There is nothing laid down. In practice, ACL Services generally prepares the policy papers on any particular subject that we are putting to the board or we know the board wants to look at, and they are sent out three weeks before a board meeting or principals committee meeting, and it flows as it would normally in a normally incorporated company.

Q. To whom does ACL Services, Ltd., send out these papers? A. We would send them out to what we call principals I or II, the directors and alternate (16) directors of ACL Ltd.

Excerpts From Deposition of Philip Edward Bates.

The names of the principals I you have already recorded earlier, starting, I think, with Mr. Ribiere.

Q. Who are the principals II, Roman numeral II? A. Roman II.

Mr. Ashworth: I think we should mention that the question should relate to the period in 1971, 1972.

The Witness: I was just going to ask which period he meant.

A. CGT, most years, Ribiere—sorry, you want the principals II.

Mirobent; Cunard, Slater; Holland America Line, Drabbe; Swedish America Line, Peter Carlsson; Wallenius, Auke Erickson.

* * *

(25) * * * Q. ACL Services Ltd., is it their function to be the instrumentality or operating company of Atlantic Container Line Ltd.? A. Basically, yes, but it is done by ACL Services having a management agreement with ACL Bermuda which spells out what ACL Services should do. It acts as a consultant and is responsible for the day to day shipping operation, dock control and marketing monitoring and activity.

* * *

(35) * * * Q. Were you aware of the negotiations between the three principals of Care Line to bring about the (36) subsequent organization known as Care Line? A. I was aware that they were producing a company or service to Canada which they were going to call Care Line, but the precise details of the wherewithals they were going to put it together, I didn't know.

Q. When did you become, and how did you become, aware of such an arrangement? A. I don't precisely recall the date as to when I first became aware that the Swedish America Line, CGT and Wallenius were producing Care

Excerpts From Deposition of Philip Edward Bates.

Line, but as soon as I did become aware of it, I then realized that it would be operating in competition to ACL, and therefore, in my role as the chairman of ACL Services, in the interest of all parties in ACL, I began to suggest that some form of understanding between the two companies should be reached to avoid competition between the shareholders of ACL outside ACL, if you follow me.

* * *

(27) * * * Q. Was the information furnished to you probably by one of the Care Line members, as you say, furnished to you in your official capacity as the director of Atlantic Container Line Services, Inc., on a business level?

(38) A. Yes.

I am searching my memory, and I think that I was approached by one of the three participants in Care Line and asked to consider whether or not ACL could slot charter or space charter the container space on the weather deck of the ship they were contemplating.

* * *

(43) * * * Q. I show you a document dated March 6, 1972, and I ask if you participated in the drafting of that agreement? A. Yes, I did.

* * *

(44) * * * Q. On that page, can you decipher the signatures to the agreement? A. Yes.

Cie Generale Transatlantique, Mr. Ribiere, witness, Mr. Mirobent; Swedish America Line—the witness is B. G. Nilson; Wallenius Line, signature is John Kleberg—can't read the witness.

* * *

(48) * * * Q. Mr. Bates, would you explain why there may not be a memorandum of understanding that is Plaintiff's Exhibit 1 for identification between ACL and Care Line signed, actually signed, on behalf of ACL? A. I think the explanation is as follows: The three owners, Care Line

Excerpts From Deposition of Philip Edward Bates.

owners, SAL, CGT and Wallenius, signed the agreement as Care Line owners.

The ACL board decided to accept the understanding and have it signed and put into effect and the original as signed by the Care Line owners was then sent to ACL Limited Hamilton, Bermuda for signature and retention.

Q. You did mention about different hats, though. What is it you said, that as long as the partners had agreed to it, they simply put on their other hat as Atlantic Container Line and approved it; so therefore, a signature wasn't necessary, is that correct?

Mr. Ashworth: I think he mentioned that all of the participants in ACL agreed to it.

(49) A. What I said was that the three Care Line owners signed on behalf of Care Line. The ACL board, of which it so happened the same companies as are members of Care Line are also members of the ACL board, then decided in conjunction with the non-Care Line partners in the ACL board to sign on behalf of ACL.

* * *

(50) * * * Q. Did you at your board meeting discuss bringing Care Line into the consortium as a member at which time various members were opposed to the idea because of the risk involved? (51) A. We didn't discuss bringing Care Line as such into the ACL consortium.

We did and have in the past discussed the question of bringing the whole of Canada, as I mentioned earlier, into ACL.

Q. In other words, by assuming the Care Line operation?
A. By direct chartering—yes.

Let me start again.

One of my ideas had been that we should charter Care Line vessels directly by ACL and avoid any Care Line

Excerpts From Deposition of Philip Edward Bates.

operation at all, but this was not acceptable to the ACL board.

* * *

(55) * * * Q. ACL Services Ltd., as such, has no agents; is that correct? A. Correct.

Q. All the agents would be agents for your principals? A. That's right.

Q. In Gothenberg, the agents for your principals were ACLAB? A. That is correct.

Q. Is that a wholly owned subsidiary of ACL Ltd? A. No, it is not.

Q. Who owns ACLAB? A. It is owned by Swedish America Line and Swedish Trans-Atlantic.

If it is of any help here, the shareholders in ACL also were the agents in their own country for ACL except that Wallenius is responsible for motor cars (56) throughout the total ACL operation and space charters space in the ACL vessels for those motor cars.

Q. How about in Bremen, who would be the agents there? A. For ACL, the port agent is Geuther, but the general cargo agent is, or was, Steinmeyer and the car agent for Wallenius was Geuther.

* * *

(59) * * * Q. Isn't it true that Geuther was actually the booking agent for Care Line? A. Correct.

Q. Wasn't there a third firm involved at Bremerhaven on behalf of Care Line as terminal manager? A. I believe Geuther's own man was terminal manager for Care Line in Bremerhaven.

* * *

(60) * * * Q. Moving on to Le Havre, ACL Ltd.'s agent in Le Havre were CGT; correct? A. That is correct.

Q. At the same time, the Care Line booking agent in Le Havre was CGT? A. That's correct.

(61) * * * Q. Did Atlantic Container Line Ltd., as a carrier assign different people or rely on different people

Excerpts From Deposition of Philip Edward Bates.

for the stowage and safety of cargo as well as the exercise of due diligence to make the vessel seaworthy; did ACL make a distinction between that cargo which would be carried on in ACL owned or chartered vessels and that cargo that would be carried on Care Line chartered vessels as to who would be performing the services in connection with these three functions? A. Dealing first with ACL and its ten-ship operation, the initial control is under Captain Franberg (62) as marine operations manager reporting to the operating director, Richard Butcher, and he has line managers responsible for each service to him located in Southampton and they deal directly with the terminal managers in the ports of call on ACL's route.

The planning of stowage of the vessels, ACL vessels, east and westbound, is patrolled and supervised by Captain Franberg and his staff.

Does that answer the questions on ACL?

* * *

Q. Assuming that ACL were to look to an employee of ACL to make a determination of the exercise of due diligence to render a vessel seaworthy, within the ACL organization, who would that person be? A. The ultimate responsibility is mine, but—

* * *

(63) * * * Q. Other than those surveys that are made for that purpose, do you make any other marine inspections of the vessels for seaworthiness? (64) A. No, we don't, because we rely on the owners of the vessels through our charter parties to present us with seaworthy vessels.

Q. The answer is no.

Turning to the shipment of cargo, on the MONT LAURIER for an example, in this case—

Mr. Ashworth: Excuse me. There is a pending question which was not answered; namely, whether

Excerpts From Deposition of Philip Edward Bates.

there was any different person relied on for these operations for ACL owned or chartered vessels and Care Line vessels and the witness was starting to answer that and then you have broken in with a new series of questions.

* * *

Q. In connection with the shipment of cargo under ACL bills of lading which was carried on Care Line vessels such as the MONT LAURIER, would your answer to any activities on the part of ACL to establish the seaworthiness of those Care Line vessels be the same as your answer with regard to the ACL vessels? (65) A. Broadly, yes, except that we as ACL would not make an off-hire service because we weren't chartering the vessels.

Q. Was there any employee, and I use the word employee in the technical sense, of ACL whose function it was to see that the ACL cargo was properly stowed when carried under ACL bills of lading on board Care Line vessels? A. No, that was a matter for Care Line.

Q. This would likewise be true of Care Line cargo on the vessels? A. Entirely the matter of Care Line. We have no responsibility for Care Line cargo in the trailer decks.

Q. Did you rely entirely on Care Line in this regard pursuant to the memorandum of understanding dated March 6, 1972? A. If I understand your question correctly, you mean did we rely on Care Line?

Q. Because of this agreement. A. Yes, we did.

Q. There was no other agreement between ACL and Care Line with regard to proper stowage or the functions or relationships between Care Line and ACL other than this agreement? (66) A. No, none.

Q. The position of ACL is that by virtue of this agreement, the entire responsibility for the cargo was delegated to Care Line on delivery of the cargo at the terminal gate;

Excerpts From Deposition of Philip Edward Bates.

is that the position of ACL? A. That's right.

Q. Because that's what this agreement says; is that the idea? A. Yes.

* * *

(67) * * * Q. Would it be fair to say, then, that on the basis of this agreement and your answer to this question, that ACL Ltd. relied on no one other than Care Line in connection with the carriage of cargo on Care Line vessels?

(68) A. Correct.

* * *

(75) * * * Q. One of the factors that I understand that concerned you in connection with the amelioration of differences between the Care Line partners and the non-Care Line partners was competition.

You had indicated this was competition between the two; right? A. Competition could have arisen between ACL with its Halifax service and Care Line with its Montreal service.

Q. Another factor involved was you were aware of (76) the fact that if you did not come to an agreement between ACL and Care Line, the Care Line partners would be in a position to go it alone and they would be taking freight that otherwise you would expect would be going on ACL ships; is that correct? A. It might have gone on ACL ships if we could secure it, yes.

* * *

(77) * * * Q. Did you, for the purpose of advising the board members prior to the effectuation of the agreement of March 6, 1972, make a representation to them that you were at that time losing money on this particular service and that the creation of a Care Line in competition would seriously affect the economic situation for ACL? A. I used the effect of competition as an added argument from my central position to make the shareholders aware of the possible effect of added competition in the Canadian trade.

Q. The question is, did you not say that the Atlantic

Excerpts From Deposition of Philip Edward Bates.

Container Line was not operating on a profitable basis in this area as it was? A. I think it's more than likely I said that in my opinion it wasn't operating on a profitable basis.

Q. Did you ultimately arrive with Care Line, in (78) addition to your memorandum of understanding of March 6, 1972, at an agreement as to whether or not ACL would have the same right against Care Line as the shippers on ACL bills of lading would have against ACL Line, ACL Ltd.? A. I am not absolutely certain, but from memory, the container cargo from the shippers' point of view moved on ACL bills of lading, but from ACL's point of view, so far as it was concerned would be carriage by Care Line, it was the understanding that the cargo would move as if it were on a Care Line bill of lading while on the Care Line vessel, but no actual bill of lading from Care Line was issued for the total number of boxes that would be on the ship at any one time.

* * *

Q. So there was no charter as such between ACL and Care Line? A. There was no charter as such because it was covered by the memorandum of understanding, the rates for the slot charter were fixed in the memorandum of (79) understanding, and were varied according to the varying formula there, and I think the memorandum of understanding spells out the way in which the bills of lading would be involved.

Q. There is no charter party as such? A. No, because we did not charter the ships. It was a space chartering arrangement only.

* * *

Excerpts From Deposition of Richard Franberg.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Deposition of defendant Atlantic Container Line Ltd., by Richard Franberg taken by plaintiff, pursuant to agreement, at the offices of Hill Rivkins Carey Loesberg & O'Brien, Esqs., 96 Fulton Street, New York, N. Y. 10038, on February 14, 1975, at 9:30 a.m., before Arlene Baker, a Shorthand Reporter and Commissioner of Deeds of the City of New York.

(2) APPEARANCES:

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Of Counsel

* * *

(6) [Examination by Mr. Mulroy]

Q. At the conclusion of the first meeting, assumedly after your qualifications and so on were discussed, did Count

Excerpts From Deposition of Richard Franberg.

Bernadotte indicate your acceptance for this position, or what did he indicate to you?

* * *

A. He was waiting for traffic manager to be arriving in Stockholm and he was going to arrive, I think it was, one or two weeks later and he wanted to consult him also.

Q. Do you know who the traffic manager was? A. Mr. Astrup.

Q. This Mr. Astrup is the traffic manager for Wallenius Line? A. No, he came from CGT.

Q. Cie Generale Transatlantique? A. Yes.

* * *

(7) * * * Q. This was approved between the two of them that you were going to be hired for this position with ACL Services, Ltd.; is that correct? A. Yes.

* * *

Q. What did Count Bernadotte and the traffic manager from CGT indicate to you in 1967 would be your duties?

A. My duties would be to assist the traffic manager in scheduling the vessels and the contact liaison with the agents, cargo agents.

* * *

(19) * * * Q. You occupied no other position during your employment other than this position as the technical man in the traffic department as far as the ACL operation is concerned; is that correct? (20) A. Yes, but not the word technical.

* * *

Q. Technical as distinguished from administrative, would that be fair? You indicated somebody else was the commercial assistant; is that correct? A. Yes.

Q. To the traffic manager, and you were the non-commercial assistant to the traffic manager and so on; is that correct? A. Yes.

Excerpts From Deposition of Ricard Franberg.

Q. I would like to ask you what particularly were your duties up to the end of 1971 while you were at Southampton in connection with the Atlantic Container Line Services Ltd.? A. My function was to coordinate the bookings, all the European bookings, allocate space on the vessel for the various agents, instruct the terminal through my assistant how to stow a vessel and maintain the schedule for the vessel.

* * *

(22) * * * Q. Do you know anything else about a particular cargo other than a particular booking agent has a certain number of containers of a certain size? A. Also other kind of cargo, trailers.

Q. But the commodity you don't know anything about? A. No, except in a few cases.

Q. What would make those few cases? A. Dangerous cargo.

Q. If it's on the dangerous manifest, you would know that it's on the dangerous cargo manifest, but that's all you would know? A. When agents book, they indicate if there is any type of dangerous cargo included in the booking, but the normal proceeding is that they, in advance, they come with a special telex asking me if they could accept the certain type of cargo.

We know it already maybe one or two weeks before the actual booking telex come in, booking telexes are only coming in during the last four days. At that stage, it (23) is a bit late, so they had to come in before.

Q. When you get this booking information from the agent, booking agent, and when the booking information indicates the existence of hazardous cargo, as far as the agent is concerned, he has performed his function in that he has advised you that hazardous cargo would be going on to the vessel? A. No, he is asking me if he can do it.

Q. And he is asking you if he can load it? A. Yes.

Q. What is the manner in which you reply to this type

Excerpts From Deposition of Richard Franberg.

of booking information? A. Well, first of all, I make sure that the information I get is—give all the details for the commodity, technical details, quantity and—well, the technical details of all of it, chemical name, whatever it is. I must know exactly what we are talking about between agent to me.

Q. Do you go back to the booking agent and ask him for additional data? A. Oh yes, if he is not giving all the data in the first case, I go back and get more information.

Q. What information must he give you in the first telex? (24) A. He has to give me the commodity name, the quantity and where it is to be loaded, where it is to be discharged. Some agents are booking for several ports.

Q. When you say where it is to be loaded, you are referring to the port, not the place on board the vessel? A. Oh, no.

Q. That's correct, what I said? A. Yes.

* * *

(26) * * * Q. Is there anything else that you do in connection with the appearance of hazardous cargo on the booking note, or what else do you do with the booking note once you received it from the booking agent? A. I have an assistant for each service who coordinates the stowage of the vessel, the stowage of the various types of cargo container and trailer deck cargo. He has to follow up that if one port, if we accept hazardous cargo from one port. We may have also hazardous cargo from another port and the next port. There might also be hazardous cargo on board the vessel already from the previous port, and they have to coordinate the stowage to separate, when necessary, these different types of hazardous cargo.

Q. It is the function of your clerks to insure that there are no incompatible cargoes stowed in the same area on the vessel; is that correct? A. Yes.

Also terminal will, of course, know the stowage layout on the vessel. They know what's on board the vessel. We

Excerpts From Deposition of Richard Franberg.

have what we call a stowage telex which is circulated to all the terminals for the particular vessel.

(27) So they know what's on board. They also know what the previous port is supposed to load because they get the copy of our communication with the previous port.

If the previous port load hazardous cargo in certain sections of a vessel, the next port will know that because it is copied on telex communications; so you will also have a double check in that port that no incompatible cargoes are stowed together.

Q. Do your port agents, based on information that is available to them, have the primary responsibility with regard to stowage to see that these incompatible cargoes are not stored in the area of each other?

Mr. Ashworth: What do you mean by primary responsibility, Mr. Mulroy?

By Mr. Mulroy:

Q. Let me ask it in this fashion.

Do you rely on your own checking as the sole determinant of proper stowage or is your operation an over-seeing type operation on which you would expect that what you are watching for has been taken care of by the local port agents? A. No, we make sure that they are doing it correctly.

* * *

(29) * * * Q. How do you give your instructions to these various port agents with regard to correcting stowage or disapproving of their stowage plan and instructing that cargo be stowed differently because of its being incompatible with other cargo in the area?

What is the media by which you communicate with (30) them? A. By telex, but also telephone.

Q. So that if I were to ask you to make a search of your

Excerpts From Deposition of Richard Franberg.

files for the year 1971, you would be able to pull out telexes in which you have told these various port agents that in connection with the manner in which they wanted it stowed, or suggested stowing it, that you wanted it done a different way; is that correct? A. Yes.

Q. The purpose of your preventing the stowage of incompatible cargo in the same area is not only to prevent damage to those cargoes, but to prevent damage to other cargoes on the vessel and the vessel itself; is that correct? A. Yes.

Q. Actually, in questioning you in this area, I was questioning you on coordinating bookings, and in addition to your answering in the area of coordinating bookings, I believe you also have given a full answer as to the third element of your function and that is the instruction of terminal agents through your assistance of how to stow vessels; is that correct? A. Yes.

Q. You have answered that for me? (31) A. Yes.

Q. In other words, do you still perform your functions in the same fashion as you did up to 1971, up to the end of 1971?

Mr. Ashworth: Same objection as to relevancy, but you may answer.

A. Yes.

Q. So the answer would be yes for 1972, yes for 1973 and to date? A. Yes.

Q. In 1971, did you become aware, particularly, I am asking you in 1971, I am not talking about your knowledge now, but in 1971, did you have any knowledge of any activity on the part of SAL, WALL, or CGT towards the creation of a roll-on roll-off service to Canada? A. Yes.

* * *

(32) * * * I am saying were you aware of any negotiations or activities that were going to create a relationship

Excerpts From Deposition of Richard Franberg.

between ACL and Care Line in the future? A. Yes, I think there was some discussion about it.

Q. Do you know who the parties to those discussions were? A. Well, I would assume it would be Mr. Bates.

Mr. Mulroy: Off the record.
(Discussion off the record.)

Q. I understand, Captain, that there is no marine department as such in ACL Services, Ltd.; is that correct? A. Yes, if by marine department, you mean technical (33) maintenance of the vessel.

Q. To the extent that there is anybody who is a ship operations man, would you be the senior consultant or adviser as to steamship operations to ACL Services, Ltd.?

* * *

A. Yes.

Q. Were you ever consulted by Atlantic Container Line Services, Ltd., or Atlantic Container Line Ltd., with regard to inspections of the four vessels that you mentioned, any of the four vessels you mentioned, that were on order by the Care Line partners? A. No.

Q. Were you ever asked to make any determination as to the fitness of those four vessels? A. No.

Q. Were you ever approached as to the stability of those four vessels? A. No.

Q. Would it be fair to say that you were never consulted in any way as to those four vessels? A. Yes.

(Whereupon, a recess was taken.)

(34) By Mr. Mulroy:

Q. My question with respect to those four vessels, I believe—since we took a break, I may have forgotten—I believe was up to the end of 1971.

Would your answer be true for 1972 as well? In other words, you were never consulted in connection with those four ships, would that be true as of 1972? A. Yes.

Excerpts From Deposition of Richard Franberg.

Q. Would it be true up to the time of the fire and explosion on the MONT LAURIER in January of 1973? A. Yes.

* * *

(35) * * * Q. In the case of cargo carried on Care Line operated vessels which were booked by ACL and on which ACL Line issued bills of lading pursuant to the understanding between ACL and Care Line, March 6, 1972, in connection with that operation, did you function in the same manner as you did with respect to the cargo that was carried on ACL Line vessels? A. No, only to a limited extent.

Q. Were you involved in the allocation of space on (36) the Care Line vessels to the booking agents of Care Line? A. Yes, that's correct.

Q. Is that the limited extent to which you refer? A. Yes. But I am referring also, of course, to the container space on weather deck.

Q. Again, allocation of container space on the weather deck? A. Yes.

Q. Did you coordinate bookings other than just the allocation of space? A. I coordinated booking and allocated space between agents.

Q. Did you instruct the terminals through your agents as to stowage? A. No.

Q. In connection with the stowage of incompatible cargoes, unlike your function under ACL operated ships, you had no function in connection with the Care Line ships; is that correct? A. Yes, no connection with the stowage of them.

Q. Was it your expectation, or was it your understanding, that somebody in Care Line would perform that function on the Care Line vessels in connection with the stowage of incompatible cargoes in the same area? (37) A. Yes.

Q. Certainly you would think somebody from Care Line

Excerpts From Deposition of Richard Franberg.

should have been performing that function; is that so? A. Oh, yes.

* * *

Q. When you carried cargo on ACL Line vessels and you issued a bill of lading to a shipper on an ACL Line vessel, is it your view that you had an obligation to those shippers to see that there were no incompatible cargoes stowed together in that vessel? A. Well, I think it's really the incompatible stowage, the stowage of incompatible commodities, is I would say regulated by a government agency.

Q. In addition to it being regulated by a government agency, it's done for the safety of cargo, is it not? A. Oh, yes, of course, and the vessel.

(38) * * * Q. Did you consider your efforts to prevent the stowage of incompatible cargo as a duty that you owed to the shippers on the ACL Line vessels? A. Most of the shipowners, to the crew.

Q. And to the shippers? A. Yes, of course.

Q. Do you know if the bill of lading that was issued to shippers on behalf of ACL, Ltd., on the MONT LAURIER, of January 1973, was the same form of bill of lading that was issued by ACL, Ltd., on those vessels that you operated directly under ACL Line? A. Yes.

Q. It was the same form bill of lading? (39) A. Yes. I didn't never see the bill of lading, but—

Q. You understood that it is the same? A. Yes.

* * *

Examination by Mr. Ashworth:

* * *

(44) * * * Q. Whose function was it to take care of the loading of ACL container cargo on Care Line vessels? A. That is Care Line.

* * *

Q. Did you receive reports from anyone in Bremerhaven

Excerpts From Deposition of Richard Franberg.

concerning the loading of ACL cargoes on Care Line vessels? A. No.

* * *

(45) By Mr. Mulroy:

* * *

Q. But you weren't involved in the loading of incompatible cargoes on Care Line vessels? A. No, but in the booking there might be hazardous cargo in the container.

Q. But it didn't come under your function as to (46) having that information? A. No.

Q. Since it was going on a Care Line vessel? A. But of course sometimes the agent indicated on the booking telex they had one container with hazardous cargo, but as a matter of fact, as far as I remember, it only happened once and I got an inquiry from Rotterdam asking if they could accept a certain type of hazardous commodity.

And I always took the position—I was not in a position to say yes or no because I was not in operation or control of the Care Line vessel, so I referred to this telex to Captain Goby in Le Havre being the Care Line coordinator and it was up to him to advise whether he could accept this inquiry from Rotterdam. Actually, the only case I can ever remember of having hazardous cargo in containers.

Q. So that it was your understanding that Captain Goby in Le Havre was performing the function for the Care Line vessels of determining the handling of hazardous cargoes or incompatible hazardous cargoes on the Care Line vessels in the same manner or in the same type of responsibility as you exercised in connection with ACL vessels? (47) A. Yes.

* * *

(49) * * * Q. CGT, then, is actually the terminal manager for ACL in Le Havre? A. Captain Goby.

Q. CGT is his employer? A. Oh, yes.

Excerpts From Deposition of Richard Franberg.

Q. To put it in terms of the primarily responsible party, the employer, it would be CGT?

Mr. Ashworth: I object. It is argumentative. He has said that the person is the terminal manager.

The Witness: Goby is the terminal manager, but he is employed by CGT.

By Mr. Mulroy:

Q. Goby is employed by CGT. He is paid by CGT and he has been designated by CGT to act as a terminal manager for ACL cargo out of Le Havre? A. Yes.

(50) Q. Should Captain Goby be replaced for want of his incapacity, deceased or otherwise, would it be CGT that would appoint his replacement? A. Yes.

* * *

Q. You testified that with respect to the Care Line vessels on which ACL issued bills of lading for which ACL booked cargo, that no information was given to you as to the Care Line Cargo on deck or under deck, the Care Line hazardous cargo, or no information by which you could make a determination of the propriety of the stowage of the Care Line cargo; is that correct? A. That is.

Q. Did you at any time ask Care Line for this information on voyages on which ACL issued bills of lading? A. No, and I don't think they would have told us, anyway.

* * *

Q. Did you at any time have any discussions with ACL Services as to whether or not you should seek this information? A. Yes, we probably discussed it, but we were most (51) sure that we would never be told of anything because they were acting as a competitor to us. They wouldn't tell us what they are shipping.

* * *

Excerpts From Deposition of Richard Franberg.

Q. Did it occur to you as something that ACL should be interested in for the protection of ACL's cargo stowed on board these same vessels? A. No, I think that can't be practical. It is not practical.

Q. In connection with the terminal manager at Bremerhaven, Eike Kuoerber, do you know from whom he drew his remuneration or his pay or his salary? A. From Atlantic Container Line.

Q. Do you know if the checks from Atlantic Container Line were made payable to him or made payable to somebody else who paid him? A. No, it was paid direct to him.

No, just a second. No, you are right.

(54) Q. And Steinmeyer was the booking agent at Bremen for ACL in connection with cargo that was going on Care Line vessels? A. Right.

Q. Who was the agent at Bremen for ACL for container cargo that was going on ACL vessels? A. As I already said, that was Steinmeyer.

Q. So Steinmeyer was ACL's agent for all purposes then, was booking agent for all purposes, for ACL? A. Except cars.

* * *

(57) * * * Q. Did you have any instructions prior to the MONT LAURIER situation in January of 1973 to make a determination of who were shipping on Care Line bills of lading? A. No, no.

Q. Would that not have been information that you should have determined? A. No. We in ACL Services were very, of course, interested from a commercial point of view to find out what they were shipping to Canada in ro-ro but it didn't make any—we never made any investigation into it.

Q. The reason you didn't make any investigation into it is because under the terms of the memorandum of understanding between ACL and Care Line dated March 6, 1972, specific efforts were set forth whereby there would be no competition; is that correct? A. Yes, you can say that.

Excerpts From Deposition of Richard Franberg.

Q. Would you say that? A. Yes, there was an agreement for Care Line not to solicit USA cargo through Canada.

Q. And also, did Care Line agree not to operate in (58) competition with ACL's customers? A. Well, not into Canada, only USA.

Q. And the Care Line vessels were going into Canada? A. Yes, we were going into Canada. So ro-ro cargo we might have picked up to Halifax probably went to Care Line direct to Montreal in competition with our service to Halifax.

Q. It would be your view that the reason that you did not get the information from Care Line as to what the nature of the commodities were that they were carrying on Care Line vessels also carrying ACL cargo was that access to this information would foster attempt by ACL to obtain the tonnage that would otherwise be going to Care Line; is that correct?

* * *

A. Yes.

(59) * * * Q. Why did you not obtain the information as to what cargoes were being carried on board the same vessels that carried your cargo? A. Well—

Q. To see to it that your cargo was properly protected. A. I think Care Line wouldn't tell us.

Q. And the reason you think they wouldn't tell you is because of the competition factor? A. Oh, yes.

* * *

(60) * * * Q. Did you bring this problem to the attention of Mr. Bates or anyone else in order to have it resolved by the board of directors as to what accommodations could be made whereby you could get the information without creating competition; did you discuss it with Mr. Bates? A. No, I can't remember discussing it with him.

Excerpts From Deposition of Richard Franberg.

Q. Did you bring it to the attention of anybody else who could bring it to the board of directors?

* * *

(61) * * * A. I don't think we discussed it in such terms as you put forward. There was a lot of discussion with the Care Line partners and I think it was more or less resolved that we would get a copy of the stowage information, the weather deck containers, which we did, but that the ro-ro cargo on the deck was not of our concern and we had no—they didn't want to give it out, this information.

Q. Did you ask for the information then? A. No, no.

* * *

Excerpts From Deposition of Rene Goby.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Deposition of Defendants, Cie Generale Transatlantique, Swedish American Lines, and Wallenius Lines, d/b/a Care Line, by Rene Goby, taken by Plaintiffs, pursuant to order of Magistrate Martin Jacobs, at the offices of Hill Rivkins Carey Loesberg & O'Brien, Esqs., 96 Fulton Street, New York, New York 10038, on September 11, 1975, at 2:30 p.m., before Anthony Mancuso, a Shorthand Reporter and Notary Public of the State of New York.

(2) Appearances:

HILL RIVKINS CAREY LOESBERG & O'BRIEN, ESQS.,
Attorneys for Plaintiffs,
96 Fulton Street,
New York, New York 10038

By: MARTIN B. MULROY, Esq.,
of Counsel

HAIGHT GARDNER POOR & HAVENS, Esqs.
Attorneys for Defendants,
One State Street Plaza,
New York, New York 10004

By: RICHARD G. ASHWORTH, Esq.,
of Counsel

* * *

Excerpts From Deposition of Rene Goby.

(3) * * * Examination by Mr. Mulroy:

Q. Would you state your name and address? A. Rene Goby, 32 Passage Femail de Moulin, 76620 Le Havre.

Q. Where, Captain, in Le Havre do you have your office or place of business? A. On Quai de l'Europe.

Q. Whose offices are those? Are these the offices of CGT? A. Is offices of CGT but only for the new group.

Q. Physically is it CGT's office? A. No, it is rented by CGT from the Port Authority.

Q. And CGT makes this office space available to you, is that correct? A. Yes.

Q. Who is your immediate supervisor in CGT? A. Captain Jauny-Gervais.

Q. What is Captain Jauny-Gervais' title? A. General agent for ACL and Care Line.

Q. To whom does Captain Jauny-Gervais report in his (4) line of authority? A. On ACL's side, Philip Bates in Southampton and in Care Line's side a Mr. Gruel in Montreal.

* * *

(5) * * * Q. Did you have an opportunity to discuss the Mont Laurier fire or this lawsuit with Mr. Ribiere before coming here today? A. Before now?

No.

Q. Did you discuss the fire or this lawsuit with any of his assistants in the ACL operation?

* * *

(6) * * * A. The answer is no, never.

Q. Did you discuss this lawsuit with any assistants or people working under Mr. Ribiere? A. Yes, with Mr. Mirobent and Mr. Jauny-Gervais.

* * *

(7) * * * Q. What's Mr. Mirobent's position? A. Mr. Mirobent is chairman of Care Line—was chairman.

Excerpts From Deposition of Rene Goby.

Q. As chairman of Care Line does Mr. Mirobent report to Mr. Ribiere? A. I don't know.

Q. Does Captain Jauny-Gervais report to Mr. Ribiere? A. No. Captain Jauny-Gervais reports to Mr. Mirobent.

* * *

(11) * * * Q. Does Captain Jauny-Gervais draw his salary from CGT in the same manner as you draw your salary? A. Yes.

Q. Are there any other supervisors or officials to (12) whom you report other than to Captain Jauny-Gervais; that is, any supervisors or officials in CGT? A. Absolutely not, no.

Q. Now, you testified that Captain Jauny-Gervais is the general agent for ACL and Care Line. Is he also in charge of the ACL booking agency operation? A. Yes.

Q. Is he also in charge of the Care Line booking agency operation? A. Yes, but he is not completely in charge in our organization.

Q. By not completely in charge, do I take it that you mean there is somebody to whom he reports or who supervises him? A. Yes.

Q. Who in CGT is in charge of the terminal operations for ACL in Le Havre? A. Captain Vigroux.

Q. Is he also in charge of the terminal operations for Care Line at Le Havre? A. No.

Q. Who is in charge of the terminal operation for Care Line at Le Havre? A. Captain Pinczon Dusel.

(13) Q. To whom did Captain Vigroux report as his supervisor? A. To me and to Captain Franberg in Southampton.

Q. To whom does Captain Pinczon Dusel report as his supervisor? A. To me only.

Q. Are you aware of the existence of a memorandum of understanding between ACL and Care Line dated March 6, 1972? A. Yes.

Excerpts From Deposition of Rene Goby.

Q. Are you familiar with its provisions? A. We can say yes.

* * *

(14) * * * Q. Were you contacted directly or were you contacted by a supervisor? A. No, directly.

Q. Who gave you instructions to cooperate with Mr. Ashworth? A. Mr. Achard.

Q. Who is Mr. Achard, from the standpoint of what is his title or position? A. Claims manager of CGT.

* * *

(20) * * * Q. Do you have any recollection of ACL or its agents contacting you and making inquiry with regard to the particular cargoes that were going to be carried on the MONT LAURIER on this voyage? A. I don't believe so.

Q. Do you have any recollection of any communications (21) prior to the MONT LAURIER voyage in this suit with regard to the stowage of cargo on Care Line vessels? A. No.

* * *

(25) * * * Q. Captain, what specifically is your function in Le Harve in connection with the booking of cargo on Care Line vessels? A. My function is to receive all booking from all ports of loading and discharge in Europe and Canada and to settle between these different booking and to give the green light for loading or not.

Q. Was it part of your function to allocate space on Care Line ships? A. Yes.

Q. Was it part of your function to instruct terminals as to the stowage on Care Line ships? A. Yes.

* * *

Q. Did the booking agents for Care Line as a matter of practice and instructions ask you if they could accept (26) certain types of cargo? A. Yes.

Q. How many clerks did you have working under you in connection with the coordination of the stowage on Care

Excerpts From Deposition of Rene Goby.

Line vessels? A. Four plus one secretary.

Q. Was it the function of you and your staff to insure that there were no incompatible cargoes stowed in the same area of the vessels? A. Yes.

Q. Was it the purpose of preventing the stowage of incompatible cargoes in the same area of the vessels to prevent damage to other cargoes on the vessel and the vessel itself? A. Yes.

* * *
Q. Did you receive a stowage Telex circulated from (27) all terminals telling you what was stowed at prior ports? A. Yes.

* * *
Q. Was it the main purpose for you receiving such Telex to permit you to go back to the terminal and accept the stowage as they laid it out or to instruct them to do it another way? A. Yes.

* * *
(28) Q. Did Captain Franberg ever ask you for stowage information in connection with Care Line cargo on Care Line vessels? A. No.

* * *
Q. Was it your understanding that when you performed services on Care Line ships that you were doing this for the protection of all cargo on the ship? A. Yes.

Q. And that included ACL cargo on the weather deck also, is that correct? A. Yes.

* * *
(29) * * * Q. Was it your understanding that ACL relied upon you to do your job correctly? A. I suppose.

Q. Was this your understanding? A. I suppose.

Q. Captain Franberg recounted to us that ACL's booking agent in Rotterdam indicated to him in a booking telex that they had a container of hazardous cargo for a Care Line ship and he took the position that it was not for him to

Excerpts From Deposition of Rene Goby.

say yes or no, because he was not in control of operations for Care Line vessels and he referred the telex to you as the Care Line coordinator to advise whether you would accept the Rotterdam cargo.

Do you remember if that is the way you did things between you and Captain Franberg? A. Yes.

* * *

(30) * * * Q. On Care Line vessels.

The services that you performed for ACL, were those services performed pursuant to the memorandum of understanding between ACL and the Care Line partners?

* * *

A. Yes.

* * *

(32) * * * Q. When you first undertook a personal responsibility with regard to Care Line vessels did you have meetings with the Care Line partners? A. Yes.

* * *

Q. Who was the individual in CGT, your employer, who instructed you to go to the first meeting? A. Mr. Mirobent.

* * *

Q. Did he indicate to you that it would be—the purpose of these meetings would be to outline additional duties that were going to be attached to your position in Le Harve? A. Yes.

* * *

(33) * * * Q. Did Mr. Mirobent indicate to you that CGT wanted you to undertake these activities on behalf of the Care Line partnership? A. Yes.

Q. Did the other two Care Line partners concur in Mr. Mirobent's selection? A. Yes.

* * *

Excerpts From Deposition of Rene Goby.

(50) * * * Q. When did you first go on the payroll of CGT? A. 1956.

Q. Did you stay on the payroll of CGT continuously since 1956? A. Yes.

Q. While you were employed with CGT they assigned you different functions and different capacities with various vessels or companies, is that correct? A. Yes.

Q. Each time you continued to draw your salary from CGT as you always had, is that correct? A. Yes.

* * *

Master's Sea Report, Annexed to Notice of Motion.**SEA REPORT**

I the undersigned Francis Pahun, Master Mariner, registered at Lorient No 14.784, Master of the M.S. "MONT LAURIER", declare: We sailed from Le Havre on Monday 8th January, 1973, bound for Montreal with 1,626 tons of general cargo carefully stowed and secured. Full crew of twenty-two men on board. Ship perfectly seaworthy. Left the pier at about 1910 hours (1810 hours Z), passage of lock from 1920 hours to 1950 hours, cleared the harbour at about 2020 hours, let down the Pilot at about 2103 hours, headed out to sea at around 2106 hours, passed to the North of the Lightship Le Havre and passed at 9 miles to the North of Barfleur at about 0010 hours (2310 hours Z), on January 9th. Passed at 14 miles to the North of the *Casquets* and set a course at 250. Fine weather. Position 49° 18 North by 05° 13 West. Set the course at 240 to sail away from a deep depression situated to the SE of Iceland.

At 0100 hours on January 10th (0000 hours Z) we put back watches 60 minutes and did this each evening up to and including January 13th. At about 0530 hours shipboard time (0530 hours Z) on the 10th, I received the weather forecasts. A depression situated at 43° North by 42° West moving East at 40 knots. I set the course West to try to pass to the North of this. That day and the following days, the Mate, the Bosun, and an Able Seaman went below to the trailer deck to strengthen the lashings. At night, visits of inspection every 2 hours in the trailer deck by the quartermaster and officers of the watch.

Two overriding principles influenced my decisions: To see to the good maintenance of the stowage and of the lashings and to follow such a course as never to fall broadside on to the wind and sea, while making as much headway as possible South so as not to sail too far away from the Azores.

Master's Sea Report, Annexed to Notice of Motion.

In this way I kept clear of the large depressions held in the North Atlantic by an anticyclone situated over England. On the 10th at 1600 hours shipboard time (1600 hours Z), we had lifeboat drill and then complete instructions on the working of the fire-extinguishers as well as on how to use the survival kits.

At about 0200 hours (0300 Z) on January 11th, I was warned of the shifting of the depression Northward, I set the course 210 so as to avoid from its centre—Winds SSE force 7. I veered gradually to 230 to take the wind and sea on the port bow. The wind veered South. Next morning we noted that the 3 cm radar scanner was lost and the scanner of the facsimile broken. Winds Westerly force 10 in the morning. I changed course frequently as well as the engine speed. The ship was pitching and rolling violently on a very heavy boiling sea. Between 0800 hours and 0900 hours (1000 hours Z) that day I noticed a first unlashings of some drums of synthetic resin marked BASF. These were re-lashed. The liquid flowed over the bottom row of drums and then over the trailer deck.

When we boarded the ship in Le Havre, these drums were loaded closely together on two levels. We could only see the top of these drums and we had no other means of judging their robustness. Then, when they came unlashed we could see that they were made of a plastic which was highly flexible under pressure and that with the movements of the ship they were being crushed. This squeezing forced off their tops.

We continued to keep a close watch on developments. The wind was West force 9 and the sea very heavy, making impossible any change of course. The day was spent consolidating the cargo. Very violent rolling on a choppy sea from 2000 hours to 2400 hours shipboard time.

Master's Sea Report, Annexed to Notice of Motion.

On the 12th at 0000 hours (0200 hours Z) the Chief Mate went below to inspect the trailer deck and warned me that the upper row of resin drums had become completely unlashd. I called for 3 men (the Bos'un, the Able Seaman, and a Quartermaster, together with the Second Mate tried to reconstitute the stowage with the help of wood and chains). I stayed all night on the bridge. The viscous oily liquid spreading through the hold and giving off fumes causing difficulty in breathing, I had all the outlet vents of the trailer deck opened and ventilated all night. Around 0800 hours (1000 Z) the weather got no better. We tried to shift the drums for'ard by rolling them in lengths of steel wire. This proved impossible as the drums were heavy and greasy and we had great difficulty in keeping on our feet. Unrolled 4 hoses laid end to end to forward part of vessel, starting from fire hydrant located near tally-office. The bilge was inspected. Air unbreathable. All ventilation outlets in the bilge were opened. Large volume of liquid in the bilge. We pumped this liquid out. We went below again wearing gas-masks to see how well it had dried out.

Intending to wash out the trailer deck we made a test to find out the reaction of resin to seawater. There was no reaction. I was afraid that the presence of liquid would make the rest of the cargo shift and I continued to hold the ship on course. I put the ship on a 2° portside list. Very heavy, high-running sea. The westerly winds reached force 9 to 10. Heavy waves were breaking over the decks, but no water was coming in through the ventilation coamings. During the morning we noticed infiltrations of liquid (resin) in the engine-room coming through the entry-hatch located in the trailer deck. We made a cement box to check these infiltrations. This liquid was dropping on the rear of the two main engines and set off a fire-alarm in the engine room. After checking the alarm-signal call

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located above the turbo blowers, we noticed the beginning of corrosion and the rotting of the synthetic fibres around the wiring. We washed the decks under the "Mafis" to reduce slipperiness and pumped out the port-side of engine room and bilges by the sumps. The pumping was made difficult in the engine-room as a result of the clogging of the hose-boxes by an accumulation of balls of synthetic material coming from the cargo. The pumping was normal in the bilges. This wash-down seemed to us reasonably effective, the decks, at least the visible portions, being less slippery. After a meeting of the principal members of the crew, I decided to call at the Azores at the first break in the weather. Persistence of the bad weather from the West.

During the night of the 12th of January, the officers and Quartermasters inspected the trailer deck to check how the cargo was holding. On Saturday morning at 0800 hours (1100 hours Z) inspection in the trailer deck by the chief mate. He noticed the presence of synthetic resin on the portside. The holds were pumped out. A calculated hosing-down of the trailer deck to eliminate the resin. Great difficulty in remaining in these sections as a result of the presence of unbreathable gas and the great slipperiness of the trailer deck.

In the afternoon of the 13th, the chief mate and two men wearing gasmasks consolidated the stowage of the Hoechst drums with planks and beams. Wind westerly force 10, very heavy, high seas. Around 1715 hours (2015 hours Z) a violent roll sent all the drums breaking free of lashings. The air became unbreathable. The drums contained combustives and poisons, all dangerous products. The 3 men hurried back aft. Around 1745 hours (2045 Z) a first "Mafi" on the portside broke its chains. We tried to relash it but it was impossible to breathe and to keep one's footing in the trailer deck. Around 1750 hours (2050 hours

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Z) four "Mafis" broke free of their moorings and struck the hull violently. The whole crew was ready to intervene and from this moment on they were standing by at emergency stations. At 1752 hours (2052 hours Z) I sent out a message calling for help to all ships and to the Amver. Around 1800 hours (2100 Z) I shifted 2 ballasts from starboard to port side to get a permanent list of 5° and to avoid the heavy elements of cargo striking against the hull. Radio contact with the M/S "PENERF" whose position was 45 miles to the South-West and sailing towards US. Around 1830 hours (2130 Z) the whole cargo broke free of lashings. The ship took a portside list of around 15°. It was to remain listing portside to the end. At 1905 hours (2205 Z) smoke in the trailer deck. I set off the fire alarm from the bridge. It was impossible to go further than the trailer deck platform. I stopped all ventilation of the trailer deck and hold. I brought two fire-pumps into action. Around 1910 hours (2210 hours Z) there was an explosion in the trailer deck. Flames and considerable smoke came out through the ventilation outlets. I ordered the use of 138 bottles of CO₂. Faced with the risk of the ship blowing up I ordered the preparation of the portside lifeboat and inflatable dinghy, and ordered the donning of life-jackets. I ordered the closing of all fire-proof doors throughout the ship. Weather conditions prevented any intervention in the forward decks. Maintained enough speed not to lose control of steering. Around 1921 hours (2221 hours Z) sent out distress call for help. Around 1955 hours (2255 Z) V.H.F. contact with M/S "PENERF". Around 2000 hours (2300 hours Z) received message from the "Liverpool Bay" (English ship) announcing her arrival around 0200 hours (0500 hours Z). I launched several rockets to indicate our position to the "PENERF". I got ready the official and secret documents, had the survival kit-bags handed out, laid out the maxi-

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mum number of buoys and waterproof torches, advised the crew not to wear too much clothing but to dress warmly for abandoning ship. Around 2100 hours (0000 hours Z) (on the 14th), breakdown of fuel oil heat .

Switched to D.O. The heat and gas fumes continued to make any intervention impossible. Maintained V.H.F. contact with the "PENERF". Around 2300 hours (0200 Z) —(on the 14th) a violent explosion occurred in the trailer deck, tongues of flame licked out of the ventilation outlets. In spite of the risk of explosion I decided to postpone the abandon as long as possible as the sea and wind conditions together with the darkness made it highly perilous and practically hopeless.

Around 0200 hours (0500 hours Z) on the 14th, the Chief Mate managed to get back into the CO₂ store-room which was filled with black smoke and to set off the rest of the bottles of CO₂ (68). Around 0250 hours (0505 Z) we went over to emergency radio frequencies. Around 0330 hours (0630 Z) another explosion in the trailer deck. The emergency lighting began to flicker. Stoppage of the gyro and the rudder engine No. 2. Around 0400 hours (0700 hours Z) failure of V.H.F. and emergency lighting. A series of several explosions. I ordered to stop the main engines. It is presumed that the electrical cables in the trailer deck were burning one after the other. I decided to give the order to abandon ship. But as the engine continued to turn I postpones the order to abandon ship, assuming the full responsibility. Abandoning ship at night in such conditions was only to be attempted as a last resort. As long as the ship was steerable and responded to the engines we held course. Around 0430 hours (0730 hours Z) the radio ceased. Around 0500 hours (0800 Z) I communicated with the "PENERF" by Aldis lamp "Have you walkie talkie?" and then got into communication by Talkie. Around 0700 hours (100 hours Z) a leap upward in the temperature

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of the outside decks whose paint-work had blackened. The spray coming over the bow turned to steam when it hit the deck. Plugged in a hose in the outside starboard alleyway and opened a valve of the main-line starboard section 5 to hose down the deck aft. At dawn the sea was very heavy and running high with troughs of 10 metres. Wind Westerly force 10. Temperature rising inside the installations.

Around 0730 hours (1030 hours Z) the Captain of the "PENERF" signalled the forecast to me: Westerly force 12 for the beginning of the afternoon. No improvement forecast. Around 0930 hours (1230 hours Z) slight lull in the wind. I decided to abandon ship. At 0945 hours (1245 hours Z) I came to starboard. The ship remained listing to port at around 15° to 20°. I stopped the engines. At 0955 hours (1255 hours Z) let down the first dinghy starboard. Difficulty in getting it clear of the stern of the ship. The cable snapped. Signalled to the "PENERF" "a dinghy at sea but nobody on board". Restarted engines to come to port. The list was 30° to 35° approx. At 1015 hours (1315 hours Z) stopped engines. At 1020 hours (1320 hours Z) lowered the portside boat to the level of embarkation deck. 13 men took their places on board together with part of the secret and official documents.

The boat was put to sea. 2 men fell into the sea. Life buoys were thrown overboard. I signalled to the "PENERF" that 2 men were in the water (they were later to be picked up alive) and that the boat had been launched.

At 10.30 hours (1330 hours Z) inflatable dinghy portside was put to sea. Difficulty in opening as it only half inflated. Brought it alongside the embarkation ladder. The men went down the ladder and jumped into the dinghy. I left the ship last after making sure everyone had abandoned ship, and taking with me the remaining official documents. These fell into the water as I left the ship.

*Memorandum of Understanding, Annexed to
Affidavit of Bengt Eric Holtzberg.*

Wind Westerly force 9; waves of 10 meters. Sea running high. Around 1130 hours (1430 hours Z) received a line from the "GORDIAN" a Norwegian vessel which had arrived but we were unable to hold on to it. Around 1200 hours (1500 hours Z) arrived leeward of the "PENERF". At 1230 hours (1530 hours Z) I went on board last. I learned that 5 survivors were on board the "LIVERPOOL BAY"; 11 on board the "PENERF". We stayed all day and all that night on the spot searching for survivors without success.

Such is my report which I certify to be sincere and truthful while reserving the right to amplify it partly or in whole if need be, I sign this document to serve and be used for its legal purpose.

Signed at . . .

**Memorandum of Understanding, Annexed to
Affidavit of Bengt Eric Holtzberg.**

6th March 1972

MEMORANDUM OF UNDERSTANDING BETWEEN
ACL AND CARELINE

- Appendices: 1. Vessel and service particulars.
2. Stevedoring charges and arrangements.

Preamble

Compagnie Generale Transatlantique, Swedish America Line and Wallenius Lines have decided to operate a joint service between Northern Europe and Canada. The service, under the name of CARELINE (Canadian RoRo Express Line) will have its operational centre in Montreal. This memorandum of understanding covers the relationship

*Memorandum of Understanding, Annexed to
Affidavit of Bengt Eric Holtzberg.*

between ACL and Careline. ACL and its agency organisation will market and book all container traffic.

ACL will provide for and arrange the carriage of containers outside terminals. Careline and its agency organisation will market and book all traffic other than container traffic and will operate the vessels and the terminals including the provision of equipment to handle containers inside terminals and for loading/discharging vessels.

ACL will pay Careline for the sea transportation of the containers and terminal handling of containers carried by the four Careline vessels. In the interim period prior to the four vessels entering service the understanding will also cover chartered vessels. Should Careline introduce changes in their service either by reducing or increasing the number or size of the vessels employed the terms of the understanding will have to be renegotiated.

This understanding has been reached in a spirit of goodwill and co-operation between the Partners concerned and may be the forerunner of further co-operations or integration in the years to come.

1. Duration

The understanding shall be for a period of three years effective from the date of introduction of the service (when the first Careline vessel is ready to load cargo) and shall be extended automatically thereafter for successive periods of one year unless either party tenders notice of termination not less than twelve months before the understanding is due to expire.

2. Currency

Canadian Dollars will be the currency used in all calculations, figures and settlements under this understanding.

*Memorandum of Understanding, Annexed to
Affidavit of Bengt Eric Holtzberg.*

3. Price and Guarantees

On the weatherdeck of their four vessels Careline will make 132 TEU available to ACL per Westbound sailing and per Eastbound sailing. This space will be chartered by ACL on liner terms on a "gate to gate" basis, as defined in Appendix 2.

- A. ACL guarantees 65% utilisation of the above space at \$177 per TEU, calculated as the average utilisation over a 12 month period. Interim payments per crossing shall be made four weeks after the sailing from or arrival at last European port on the basis of the guaranteed utilisation per sailing as per 3B. Final overall settlement shall be made at the end of each twelve month period, however, the first period shall be between August 1st 1972 and June 30th 1973. Subsequent settlements shall be made at twelve monthly intervals. In the event of Careline being unable to provide 132 TEU without any loading or discharging restrictions, other than acceptable to ACL, whether on a Careline owned or chartered vessel ACL will guarantee at \$177 per TEU 65% of whatever capacity Careline offer on the weatherdeck, up to a maximum of 65% of 132 TEU slots per weekly crossing.
- B. The guarantee of 65% utilisation to start on August 1st 1972 payments up to August 1st 1972 to be based on container space at 177 TEU up to 65% utilisation, thereafter at the reduced rate as per item 3C.
- C. For the space above 65% utilisation ACL undertakes to pay 78 dollars per TEU for the space used providing:—
 - (i) The average gross freight per loaded TEU averages \$553 or over during a twelve month

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period. However, the first period to start from introduction of the service through June 30th 1973 and each period of 12 months will start thereafter on July 1st of each year.

- (ii) In the event that the gross average freight falls below 553 dollars per TEU during a twelve month period, then the price paid will be reduced pro rata from 78 dollars but not below 52 dollars per TEU, retroactive for that twelve month period. In order to assess the pro rata rate between \$78 and \$52 the following procedure is applicable:—

First multiply the total guaranteed utilisation in TEU by \$553. The space taken above 65% utilisation is divided into the difference between the total gross freight actually achieved and the amount calculated as above. The space is then charged at whatever proportion this rate bears to \$553 related to \$78 per TEU. However, for the first period defined hereabove in Item 3C. (i) the total gross freight to be considered will be the average gross freight achieved per loaded TEU from introduction of the service until June 30, 1973 multiplied by the space utilized from August 1, 1972 through June 30, 1973 in accordance with calculation procedure defined above.

- (iii) By gross freight is meant manifested ocean freight, freight surcharges which are not to be credited to Careline as per Item 3E and any difference between the terminal charges i.e. handling charges assessed by ACL and amounts paid to Careline to cover harbour dues i.e.

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wharfage assessed by NHB and by ocean port and base port authorities in Europe.

- D. Loading and discharging and terminal costs on a "gate to gate" basis are agreed at \$125 per unit (both 20 and 40) as per Appendix 2 attached.
- E. Surcharges relating solely to increased vessel and stevedoring terminal costs are for the credit of Careline. Other charges are to be regarded as freight increases due to ACL and are, therefore, subject to the provisions of the escalation clause.

4. *Escalation*

The agreed rates on liner terms on a "gate to gate" basis as per 3 A B C and D above shall apply during 1972. Thereafter the rates shall be reviewed on a six monthly basis as follows:

- (i) The slot rate per TEU shall vary up and down to the nearest dollar in proportion to variations in the average manifested gross freight per loaded TEU during the six month period in question as compared with the average manifested gross freight in the preceding six month period. The slot rate per TEU not to go below \$170 per TEU. The first comparison shall be made on the 30th June, 1973 between the first half year of 1973 and the second half year of 1972. The average manifested gross freight shall be the weighed average manifested gross freight per loaded TEU for Canadian cargo carried in containers by Careline and ACL Halifax services from and to the Continent and Scandinavia but not from and to the U.K.

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- (ii) The loading discharging and terminal rate on a "gate to gate" basis per unit shall vary to the nearest dollar in proportion to variations in the actual ACL loading and discharging costs per straight time unit rate caused by the increase and decrease in the wages of labour by reason of any applicable national or local industrial agreement. In order to establish the actual ACL variations, the weighed average of the straight time per LOLO unit rate in Le Havre, Rotterdam, Bremerhaven, Gothenburg and Halifax is applicable. If ACL rates were to decrease because of the common stevedores, taking into account additional volume of Careline traffic, such decrease not to count for variation of "gate to gate" rate.

5. Conditions of Carriage

The following principles should apply:—

- a) When Careline accepts an ACL container at terminal gate it is responsible for the container and its contents until they are collected at the terminal gate at the port of delivery.
- b) The measure of liability shall be that enacted in legislation giving statutory effect to the Hague Rules.
- c) Careline shall inspect containers for damage on receipt and will be held responsible for any damage to the containers not noted which is subsequently found on receipt at the delivery terminal.
- d) Similarly ACL will only accept responsibility for damage caused to a Careline vessel or personal injury to a person where this is caused by a defect in a con-

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tainer which could not have been discovered by a proper inspection by Careline.

- e) ACL and Careline should, in joint negotiations through the expertise of respective legal and insurance departments, endeavour not to double insure and to simplify claims procedures but it is noted that it should not be to the detriment of ACL as compared with ACL present through transport insurance cover.

6. Performance

Preamble. ACL is concerned that its service to its customers is in no way impaired by ACL's participation in Careline over which ACL has no operational control. It is therefore agreed that ACL and Careline shall from time to time mutually agree sailing schedules.

Indemnities

A. Except as provided below Careline shall ensure that its vessels comply with the agreed sailing schedules and service obligations and shall indemnify ACL for any losses it incurs as a result of Careline failing to comply with these schedules and obligations. No adjustment of a sailing schedule due to any failure on the part of Careline to comply with that schedule shall relieve them of any liability when such failure should cause exceptional losses to ACL. Careline shall not, however, be liable for any loss suffered by ACL as a result of a schedule being changed with the concurrence of ACL. Equally ACL shall indemnify Careline for exceptional losses incurred as a result of ACL's operational requirements beyond those provided for in the agreed sailing schedules and service obligations.

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Exceptions. Careline shall not be liable in any case for any delay in complying with a sailing schedule or service obligation where this delay has been caused by restraint of princes and peoples, force majeure, war, strikes, riots, civil commotion, lockouts, unusual intervention of port or customs authorities or any deviation to save life; neither shall Careline be liable for any such delay from any other cause whatsoever which was beyond their control and without their actual fault or privity.

Poor Performance

B. In assessing the performance of Careline in maintaining schedules the performance of ACL in services calling at Halifax shall be used as a measure of such performance. In the event of continued non-performance or performance falling appreciably below the standard required by sailing schedules and service obligations ACL shall have the right to discuss waiving the utilisation guarantee and/or pay charter hire at a reduced rate to be mutually agreed.

Total Loss

C. In the event of actual or constructive total loss of a Careline vessel ACL shall have the right but not the obligation to reconsider this memorandum of understanding unless Careline substitute a vessel suitable to ACL.

7. Hardship

In the event of unforeseen developments occurring which are of such a nature as to materially affect the financial results of the operations or otherwise severely impair the viability of the venture and which would thus constitute an undue hardship for any one of the parties to this understanding if the venture continued totally or at any rate under the above terms, then the suffering party shall have

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the right to negotiate with the other party the conditions for the termination of the understanding or new terms that will place the suffering party in roughly the same position as at the signing of this understanding, had the developments in question not occurred.

8. Arbitration

Any dispute arising under this understanding shall be referred to arbitration in London (or such other place as may be agreed). One Arbitrator to be nominated by each party to this understanding. In the event of the Arbitrators being unable to agree then the dispute shall be referred to an Umpire to be appointed by them. The award of the Arbitrators or the Umpire to be final and binding on both parties.

9. U.S.A. Traffic

Careline will not solicit or have agents in the U.S.A. or provide a service for containers, Ro Ro and car traffic that originate from or destined to USA and will not deliberately carry US traffic unless otherwise agreed by ACL.

In interpreting the above clause it is agreed that ACL New York organisation has the sole authority in North America to negotiate, in conjunction with European General Agents owned by ACL Partners, Westbound and Eastbound traffic with shippers/receivers. In exercising this right and offering the gateway the following guidelines apply:—

1. ACL New York has the right to secure US import and export traffic via United States Eastcoast ports as first priority by any means profitable to ACL.
2. Should shippers/receivers nevertheless require shipment via Canadian port then Careline service via

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Montreal and ACL services via Halifax to be offered by ACL New York to shippers/receivers at the same time as two alternatives; it being up to the shippers/receivers to decide which service they require.

3. In case of close down of United States Eastcoast ports or any other circumstances which prevent a normal flow of cargo through United States Eastcoast ports then ACL has the right to endeavour to keep its normal US traffic on its own vessel.
4. Basic Careline commission for US traffic booked with Careline to be granted ACL New York by Careline.

10. *Canadian Traffic*

ACL and Careline to agree on the same price policy for genuine Ro Ro traffic as otherwise the rate level of one line will influence that of the other and there is little way of controlling diversion of traffic.

11. *Containers in Ro Ro Decks*

ACL can unit Charter space on Liner terms for containers in Ro Ro decks at rates mutually agreed from time to time.

12. *Quebec Liquor Board*

In view of recent developments this traffic should be ACL's responsibility but the contract to be negotiated by Careline and its agents on behalf of ACL who will accept the terms so long as they show a contribution. Failing contribution being achieved and Careline still wish to offer a service the matter should be reviewed between Careline and ACL. Quebec Liquor Board traffic requiring underdeck stowage will be covered under Item 11 above if moving for ACL account. Basic ACL commissions on this traffic to be paid to Careline or its agents for splitting into port agency commission and sales commission as agreed.

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Affidavit of Bengt Eric Holtzberg.*

13. *Agencies and Commission*

- (A) ACL will pay to its Agents the normal ACL West and Eastbound commission rates, on normal ACL basis and terms.
- (B) In certain cases it will be necessary for ACL General Agents to agree with Careline port Agents a suitable commission for services rendered which ACL General Agents will pay out of commission received from ACL. The Partner to this understanding will use its best endeavour to ensure terms mutually acceptable to the Gen-Agents and port Agents are achieved.
- (C) ACL Agents to ensure that all necessary documentation is prepared to cover cargo shipped under ACL BS/L. ACL Agents to provide the Careline Agents in due time with all necessary documentation, as produced by ACL agents, including ACL manifests, as is required by customs terminal and other authorities. Careline or its Agents to be responsible for clearing vessels in and out and for ensuring that all necessary documentation is presented to authorities as and when required by those authorities.

In witness whereof the parties to this Understanding have herewith set their hands and seals the day and year first written above.

Atlantic Container Line (Bermuda) Ltd.,
by (Illegible Signature)

In the presence of
(Illegible Signature)

Appendix 1.

Compagnie Générale Transatlantique
by (Illegible Signature)

In the presence of
(Illegible Signature)

Swedish America Line
by (Illegible Signature)

In the presence of
(Illegible Signature)

Wallenius Lines
by (Illegible Signature)

In the presence of
(Illegible Signature)

APPENDIX 1.

VESSEL AND SERVICE PARTICULARS

CARELINE VESSEL PARTICULARS

Names: MONT ROYAL	(Swedish Flag)	delivery expected	16 March 72
MONT LAURIER	(French Flag)	" "	mid April 72
MONT LOUIS	(French Flag)	" "	end August 72
MONTMORENCY	(French Flag)	" "	end December 72

Particulars:

Deadweight	5500 tons
Overall length	443'
Breadth at upperdeck	63'6"
Depth Mld at upperdeck	42'8"
Draft Max	21'2"
Speed in service	17 knots
Ice Class	I.A.

Appendix 1.

CONTAINER CAPACITY ON WEATHER DECK

Aft Deck:

1 section of 4 x 40' (2 high) = 16 T.E.U.

Forward Deck:

6 sections of 6 x 20' (2 high) = 72* T.E.U.

2 sections of 6 x 20' (2 high) = 24 T.E.U.

2 sections of 5 x 20' (2 high) = 20 T.E.U.

132 T.E.U.

* These 6 sections can either accommodate 20' or 40' for a total of 36 x 40' units.

Weight Limitations on Weather Deck

40 Tons per stack of 40' containers

30 Tons per stack of 20' containers

Containers Lashing/Securing per vessel

232 pieces SEASAFE TRANSPORT containers lashing complete with rods, chain (2,9 metres Ø 12,5mm) hooks and lover, galvanized.

16 pieces SEASAFE TRANSPORT containers lashing as above but longer rods (3,2 metres) galvanized.

274 pieces SEASAFE TRANSPORT containers fittings (single) type S 131.9, galvanized.

36 pieces SEASAFE TRANSPORT containers fittings (bridge) type S 133,20 galvanized.

PORTS OF CALL/TERMINALS

CARELINE will operate a regular service between Scandinavia, the North Continent, France and the ports of Mon-

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treal and Quebec. A possible call at a U.K. port might be added in 1973.

For 1972 the following ports/terminals will be used:—

Gothenburg	SKANDIAHAMMEN
Bremerhaven	CONTAINER TERMINAL BREMERHAVEN NORDHAFEN
Rotterdam	HEIJPLAAT—UNITCENTER TERMINAL
Le Havre	QUAI DE GIRONDE or QUAI DE L/AT- LANTIQUE till mid 1972, then new ter- minal
Montreal	SECTION 12/SHED 2 until later end of 1972, thereafter JACQUES CARTIER TER- MINAL.
Quebec	SECTION 27/SHED 28

SCHEDULE

The tentative schedule for 1972 is as follows:—

Gothenburg

ARR	Monday	0600 HRS
SAIL	Monday	1300 HRS

Bremerhaven

ARR	Tuesday	1400 HRS	(ARR	Tuesday	1400 HRS
SAIL	Tuesday	2230 HRS	(SAIL	Wednesday	0500 HRS

Rotterdam

or (

ARR	Wednesday	1630 HRS	(ARR	Wednesday	2330 HRS
SAIL	Thursday	1600 HRS	(SAIL	Thursday	1600 HRS

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Le Havre

ARR Friday 1000 HRS
SAIL Saturday 0800 HRS

Le Havre-Montreal

Saturday 0800 HRS) 9 days
Monday 0700 HRS) 9 days

Montreal

ARR Monday 0700 HRS
SAIL Wednesday 2200 HRS

Quebec

ARR Thursday 0700 HRS
SAIL Friday 1800 HRS

Quebec-Gothenburg

Friday 1800 HRS) 9½ days
Monday 0600 HRS) 9½ days

Appendix 2.

CARELINE FIXED HANDLING RATE ON
"GATE TO GATE" BASIS

I. INCLUDED

- a) Reception and delivery (gate costs) of units during straight working hours according to the custom of each port. Any units handled in overtime working hours on special request of ACL (or their agents) overtime differentials for account of ACL.

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- b) Mounting and demounting containers on/from wagon, lorry or any other means of transport at terminal area during same straight working hours. Any units handled in overtime working hours on special request of ACL (or their agents), overtime differentials for account of ACL.
- c) Free storage of full units in accordance with contractual number of free days allowed, but not less than three working days for both import and export containers.
- d) The loading and discharging of full and empty containers on/from vessels, including labour waiting time before vessel's arrival, labour deadtime after completion of the operation, overtime if not specifically requested by ACL and any delay time or detention during the operation occurring by reason outside the control and responsibility of ACL, unless CARELINE shall prove to the contrary. ACL (or their agents) to ensure that all the containers to be loaded on CARELINE vessels be delivered to CARELINE terminals at least on the day prior the scheduled arrival day of vessels at each European port and on the day prior the scheduled departure day of vessels from each Canadian port. ACL is responsible for customs documentation clearance.
- e) Shifting of containers on the vessel or via the quay unless specifically requested by ACL or resulting from the negligence of ACL or their agents or from the deadline delivery dates as indicated here-above in I(d) not being respected by ACL or their agents.
- f) Tallying, damage inspection of containers including the preparation of E.I.R. forms, and any other

Appendix 2.

normal clerical duties in the terminal. All ACL full containers, besides the containers stuffed by CARELINE on behalf of ACL, shall be delivered sealed to the CARELINE terminals and ACL should make labels available. Should such full containers be delivered unsealed to CARELINE terminals, the sealing will be done by CARELINE who however will not be held in any way responsible for the contents of such containers.

- g) Lashing and releasing containers on vessels.
- h) Extra or double handlings on the terminal unless requested by ACL or resulting from the negligence of ACL or their agents.
- i) Conveyance of L.C.L. units to (WB) or from (EB) packing shed including demounting or mounting from/on wheels, as long as the packing shed is located on the terminal.

II. EXCLUDED

- a) Storage costs and or demurrage charges after expiration of the free period mentioned under (c) above.
- b) Official customs dues or taxes on the cargo and charges for customs examination. If in a port customs officers are required to be present during vessels' operating time in port, any overtime incurred to be for account of CARELINE unless required for the handling of containers when such handling is performed in overtime at the request of ACL or their agents.
- c) Consumption of electricity or fuel for running reefer units and servicing of reefer units on the terminal and any charges for the use of reefer connections.

Appendix 2.

- d) Receiving, storing and delivering (but not extra handling for terminal operator's convenience) of empty containers on the terminal. In case contractual free time also applies to empty containers same to be allowed to ACL.

Empty containers assigned to be discharged from or loaded onto vessels shall be regarded as full containers under this understanding.

- e) Packing and unpacking charges for L.C.L. units, delivery and receiving of breakbulk shipments, storage and demurrage costs. Conveyance of empty containers from (WB) or to (EB) packing shed.

Notes:

1. Where costs are to be borne by ACL the rates for these costs are to be mutually agreed by ACL and Careline.
2. *Terminal Charges and Wharfage*

ACL pays Careline (as Stevedores) for loading, discharging and terminal handling. ACL have the right to recover any terminal charges and wharfage from the shipper/consignee as it wishes.

ACL however agrees to pay to Careline wharfage charges on cargo paid by Careline to NHB. ACL also agrees to pay to Careline charges on cargo, assessed by port authorities in Europe against shipper/consignee, should such charges be debited to Careline.

MEMORANDUM OF AGREEMENT**UNDER CARELINE VOYAGE SPACE CHARTER**

CARELINE as TIME CHARTERERS and ATLANTIC CONTAINER LINE LIMITED as SPACE CHARTERERS have this day agreed

Appendix 2.

on a Space Charter which shall include all the terms and conditions of the CARELINE/ACL memorandum of understanding dated 6th March 1972, which shall be deemed to incorporate the Contract of Affreightment.

Vessels operating the CARELINE Service are; MONT ROYAL, MONT LAURIER, MONT LOUIS and MONTMORENCY and/or such other vessels as may from time to time be advised.

(Illegible)

For COMPAGNIE GENERALE TRANSATLANTIQUE

(Illegible)

For AB SVENSKA AMERIKA LINIEN

(Illegible)

For REDERI AB SOYA

(Illegible)

For ATLANTIC CONTAINER LINE LIMITED

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**Sample Bill of Lading, Annexed to Affidavit of
Martin B. Mulroy (Front Side).**

(Photoprint)

(For convenience of Court and Counsel this Exhibit is
bound in on the opposite page)

KENWOODS MOVING & STORAGE
255 Montee de Liesse
MONTREAL 377 QUEBEC CANADA

Cla. Générale Transatlantique
Compagnie Steamer Ship Company, Ltd.
Holland American Line
Norddeutscher Lloyd Line
Swedish Transatlantic Line
Woolerite Line

P & S 5579
MONTREAL
CANADA

34

FREIGHT PREPAID

Number of original B-1
TWQ: 2

Place of Issue: Signature:
FOR ATLANTIC CONTAINER LINE, LTD.

[illegible]

(* Applicable only when document used as Through Bill of Lading)

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**Sample Bill of Lading, Annexed to Affidavit of
Martin B. Mulroy (Back Side).**

(Photoprint)

(For convenience of Court and Counsel this Exhibit is
bound in on the opposite page)

GENERAL AGENTS in Continental Europe

Atlantic Container Line (Rotterdam) N.V. Register of Commerce
for Belgium, Luxembourg, West Germany, Switzerland, Austria, Italy
Willem II-laan 76, Rotterdam
Rotterdam 110629

Compagnie Générale Transatlantique
for France, Switzerland, Italy, Spain, Portugal
6, Rue Auber
17, Battery Place

Paris
New York, N.Y. 10004

AGENTS

Bremen	Gottfr. Steinmeyer & Co. Schlichte 19/20	Baltimore	Ramsey, Scarlett & Co. Inc. 810 Keyser Building
Antwerp	Sasse & Co. Meir 24	Norfolk	Ramsey, Scarlett & Co. Inc. 824 Revster Building
Le Havre	Compagnie Générale Transatlantique 89, Boulevard de Strasbourg	Halifax	Atlantic Container Line (Canada) Ltd. Pier C
		Montreal	Atlantic Container Line (Canada) Ltd. 465 St. John Street

Endorsements

1. DEFINITIONS. ACL means Atlantic Container Line Ltd. Merchant means and includes the Shipper, the Consignee, the Holder of this Bill of Lading, the Receiver and the Owner of the goods.

2. CONTRACTING PARTIES. The contract evidenced by this B/L is between the Merchant and ACL and it is agreed that ACL only shall be liable as Carrier under this contract.

3. RESPONSIBILITY.

I. ACL shall be responsible for the goods from the time when the goods are received by ACL at the sea terminal at the port of loading to the time when they are delivered or despatched by ACL from the sea terminal at the port of discharge and also during any previous or subsequent period of carriage by water under this Bill of Lading subject to the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 25th August, 1924, and any legislation making those rules compulsorily applicable to this Bill of Lading, including the Carriage of Goods by Sea Act of the United States of America, approved 16th April, 1936, or the Canadian Water Carriage of Goods Act, 1936. It is agreed that such Rules and Act shall also apply to deck cargo.

II. When either the place of receipt or place of delivery set forth herein is an inland point in the USA, Canada or Europe, the responsibility of ACL with respect to the transportation to and from the sea terminal ports will be as follows:

(a) Between points in Europe, to transport the goods.

(1) if by road, in accordance with the Convention on the Contract for the International Carriage of Goods by Road, dated 19th May, 1956 (CMR).

(2) if by rail, in accordance with the International Agreement on Railway Transports, dated 25th February, 1961 (CIM).

(3) if by air, in accordance with the Convention for the Unification of certain Rules relating to International Carriage by Air, signed Warsaw 12th October, 1929, as amended by the Hague Protocol, dated 28th September, 1955.

(b) Between points in the USA or Canada, to procure transportation by carriers (one or more) authorized by competent authority to engage in transportation between such points, and such transportation shall be subject to the inland carrier's contracts of carriage and tariffs. ACL guarantees the fulfilment of such inland carrier's obligations under their contracts and tariffs.

III. As to services incident to through transportation, ACL undertakes to procure such services as necessary. All such services will be subject to the usual contracts of persons providing the services. ACL guarantees the fulfilment of the obligations of such persons under the pertinent contracts.

IV. When the goods have been damaged or lost during through transportation and it can not be established in whose custody the goods were when the damage or loss occurred, the damage or loss shall be deemed to have occurred during the sea voyage and the Hague Rules as defined above shall apply.

V. ACL does not accept responsibility for any direct or indirect loss or damage sustained by the Merchant through delay, unless ACL is liable for consequences of delay under any laws, statutes, agreements or conventions of a mandatory nature.

VI. No servant or agent of ACL or any independent contractor or subcontractor employed by ACL to carry out any of its obligations hereunder shall, in any circumstances whatsoever, be under any greater liability to the Merchant than ACL for any loss, damage or delay howsoever caused to the goods, but shall be entitled to the benefit of every exemption, limitation, condition and liberty herein contained in favour of ACL. For the purpose

of this provision all such persons shall be deemed to be parties to the contract evidenced by this Bill of Lading made on their behalf by ACL.

4. PACKING AND MERCHANT-OWNED EQUIPMENT. The Merchant shall be liable for any loss, damage or injury caused by faulty packing of goods within containers and trailers and on flats when such packing has been performed by the Merchant or on behalf of the Merchant.

ACL does not accept responsibility for the functioning of reefer containers or trailers, not owned nor leased by ACL.

5. ROUTE. The goods may be carried by any route whatsoever, whether or not the most direct or advertised or customary route, via any ports or places in any order whatsoever and for whatsoever purpose visited, together with other goods of every kind, dangerous or otherwise stowed on or under deck. Vessels may sail with or without pilots, undergo repairs, adjust equipment, drydock and tow vessels in all situations.

6. SUBSTITUTION OF VESSEL AND TRANSHIPMENT. ACL has the right, but not the obligation, to carry the goods by any substitute vessel, or by any other means of transport whether by water, land or air, and may discharge the goods at any place for transshipment, tranship, land or store the goods either on shore or afloat and reshipe or forward the same.

7. DECK SHIPMENT. ACL shall be entitled to carry the goods on deck in containers.

8. DELIVERY OF GOODS. If the goods are not taken by the Merchant within a reasonable time of ACL calling upon him to take delivery, ACL shall be at liberty to put the goods in safe custody on behalf of the Merchant at the Merchant's risk and expense.

9. FREIGHT AND CHARGES

a) Freight to be paid in cash without discount and, whether prepayable or payable at destination, to be considered as earned on receipt of the goods and not to be returned, goods lost or not lost.

b) Freight and all other amounts mentioned in this B/L are, at the option of ACL, to be paid in the currency named in this B/L or of the country of the port of loading or port of discharge, at the highest selling rate of exchange for banker's sight draft current on the date of the freight agreement or on the date of this B/L or for prepayable freight on the day of loading, or for freight payable at destination on the day when the vessel is entered at the Customs House or on the date of withdrawal of the delivery order.

c) All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.

d) The Merchant shall reimburse ACL in proportion to the amount of freight for any increase of war risk insurance premium and war risk increase of the wages of the Master, officers and crew and for any increase of the cost for bunkers and for deviation or delay caused by war or warlike operations or by government directions in such condition.

e) The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurement or value of the goods but ACL reserves the right to have the contents inspected in order to ascertain the weight, measurement or value for the purpose of verifying the freight basis. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct freight and the freight charged or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to ACL notwithstanding any other sum having been stated on the B/L as freight payable.

10. LIEN. ACL shall have a lien on the cargo for any amount

due under this contract and for cost of recovering same and shall be entitled to sell the goods privately or by auction without prior notice, advertisement or legal authority to cover any claim. If on sale of the goods, the proceeds fail to cover the amount due and the cost and expense incurred, ACL shall be entitled to recover the difference from the Merchant.

11. GENERAL AVERAGE. General Average to be adjusted at any port or place at ACL's option, and to be settled according to the York-Antwerp Rules 1950. In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which ACL is not responsible by statute, contract or otherwise, the Merchant shall contribute with ACL in General Average to the payment of any sacrifice, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by ACL, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers. Such deposit, as ACL or its agents without prejudice may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon, shall, if required, be paid to ACL or its agents prior to delivery into a special account in accordance with the provisions of the said Rules.

12. OPTIONS OF ACL. If it shall be considered by ACL at any time that the performance or continued performance of this contract may subject the ocean vessel, her crew and cargo or other transport to any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind, ACL shall be entitled, whether or not the events in question existed or were anticipated at the time of entering into this contract, if the carriage has not already commenced, to cancel this contract, or, in any event, to discharge, tranship, land or deliver the goods at any convenient port or place or to forward them at the sole risk and expense of the Merchant, or otherwise to deal with the goods as ACL may think advisable under the particular circumstances. In any such event ACL shall be entitled to full freight and to a reasonable extra compensation for any service rendered to the goods.

13. JURISDICTION. Disputes arising under this Bill of Lading shall be determined at the option of the Merchant either by the Commercial Court in London in accordance with English law or by the U.S. District Court for the Southern District of New York in accordance with the laws of the United States.

14. INSURANCE. When the shipper or consignee requests insurance ACL will effect coverage at shipper's expense under its open policy, subject to all of the terms and limitations thereof. Such open policy shall include the following London Institute cargo clauses: (a) All risks, and (b) War, strikes, riots and civil commotions. Copies of such cover may be inspected at ACL offices. Insurance charges collected by ACL shall be for account of the underwriter.

GOODS OF DANGEROUS OR DAMAGING NATURE AND RADIOACTIVE MATERIAL MUST NOT BE TENDERED FOR SHIPMENT UNLESS WRITTEN NOTICE OF THEIR NATURE AND THE NAME AND ADDRESS OF THE SENDER AND THE RECEIVER HAVE BEEN PREVIOUSLY GIVEN TO ACL SUB-CARRIERS, MASTER OR AGENT OF THE VESSEL AND THE NATURE IS DISTINCTLY MARKED ON THE OUTSIDE OF THE PACKAGE OR PACKAGES AS REQUIRED BY APPLICABLE STATUTES OR REGULATIONS AND IN ADDITION ON EACH CONTAINER, FLAT, TRAILER ETC. A SPECIAL STOWAGE ORDER GIVING CONSENT TO SHIPMENT MUST ALSO BE OBTAINED FROM ACL. THE MERCHANT WILL BE LIABLE FOR ALL CONSEQUENTIAL DAMAGE AND EXPENSE IF ALL THE FOREGOING PROVISIONS ARE NOT COMPLIED WITH.

**Letter, dated February 11, 1975 and Attachment,
Annexed to Plaintiffs' Memorandum of Law.**

Letterhead of HAIGHT, GARDNER, POOR & HAVENS

February 11, 1975

BY HAND

Messrs. Hill, Rivkins, Carey,
Loesberg & O'Brien
96 Fulton Street
New York, N. Y. 10038

Attention: Martin B. Mulroy, Esq.
NORMANDY MANUFACTURING V.
ATLANTIC CONTAINER LINE
74 Civ. 263 WK

Your File 88433-MBM
Our File 2865-22

Dear Sirs:

In reviewing the Memorandum of Understanding dated 6th March 1972 between ACL and Care Line, we today discovered that one of our copies has a different Appendix 2 than the other. The copy submitted with the motion for summary judgment identified in the Holtzberg affidavit, includes the two appendices referred to on the first page of the Memorandum. Our other copy, however, is only an extract of some of the provisions of the Memorandum, and instead of the original appendices includes a page captioned *"Appendix 2" and dated 22nd March 1972, copy of which we enclose herewith. We regret that we did not notice the difference before now, having assumed that Appendix 2 to the copy filed included the same text as the enclosed Appendix 2.

Very truly yours,

HAIGHT, GARDNER, POOR & HAVENS
By RICHARD G. ASHWORTH
Richard G. Ashworth

RGH/je

*Enc.

*Letter, dated February 11, 1975 and Attachment,
Annexed to Plaintiffs' Memorandum of Law.*

Appendix 2

Interpretation of section 5 of the Memorandum of Understanding between ACL and Care Line

1. *Equipment*

Care Line shall inspect containers on receipt and on delivery following the ACL normal inspecting procedures and making use of the ACL technical staff as far as this is possible.

Care Line shall be responsible for damages to the equipment (fair wear and tear excepted) but only to the extent that Care Line can recover these amounts from any subcontractor. It shall be presumed that any damages to such equipment shall have occurred whilst being handled by the subcontractors.

Care Line shall advise ACL of any defects in the equipment.

The fact that no references about the condition of the equipment is mentioned in the contract of carriage shall not prejudice the Partners' agreement as set out above.

2. *Cargo*

It is understood that no cargo shall be stuffed by Care Line under the present agreement.

All cargo carried under this agreement will be subject to the terms and conditions of the ACL B/L which will be issued to the shipper. When the ACL B/L is issued by Care Line this will be done by them as agents only for ACL. No responsibility whatsoever shall apply to Care Line as a result of the issuance of such bills. No Care Line B/L is to be issued to ACL for con-

*Letter, dated February 11, 1975 and Attachment,
Annexed to Plaintiffs' Memorandum of Law.*

tainers shipped under this agreement but it is understood that the transport is subject to the conditions in the Care Line B/L with the exception that the applicable Carriage of Goods by Sea Act shall apply for the sea transport as well as for the terminal stages. Further it is understood that as to the relationship between ACL and Care Line each container shall be deemed to be a package and that the package in this case comprises the container with the cargo.

3. *Claims procedure*

ACL will handle all claims arising under their B/L and Care Line shall provide ACL with all required documentation and information.

4. This interpretation is based upon the understanding that it best serves the aim as set out in clause No. 5 e/ and both parties are entitled to propose a revision in so far as experience calls for such amendments.

1972-03-22

**Application for Decision on Deferred Motions for
Summary Judgment.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

By Memorandum and Order dated September 27, 1974 the Court deferred decision on defendants' motions for summary judgment pending completion of discovery by plaintiffs on the limited issue of the relationship between defendant Atlantic Container Line, Ltd. ("ACL") and the three Care Line defendants and their relative responsibilities with respect to the operation of the m/v Mont Laurier. The Court held that unless there was a genuine issue as to actual fault or privity of ACL, the complaint must be dismissed as to it and, if so, the complaint should also be dismissed as to the Care Line defendants on the ground of *forum non conveniens*.

The moving papers show, and it is not contested, that the fire which destroyed the m/v Mont Laurier broke out in her trailer deck during a severe storm; it is undisputed that plaintiffs' cargo was all container shipments stowed on the weather deck, carried under bills of lading issued by ACL, not Care Line. It is also common ground that the Mont Laurier was operated in the Care Line service, and that all the underdeck cargo was carried under Care Line bills of lading. Plaintiffs assert that the fire was caused by improper stowage of Care Line cargo in the trailer deck, and for purposes of a summary judgment motion this allegation must be taken as true.

The sole legal issue, therefore, is quite simple: was the relationship between ACL and Care Line such that ACL

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is chargeable with "actual fault or privity" in the stowage of the Care Line cargo? The facts are not disputed.

Care Line is a partnership of three shipping companies, defendants Cie. Generale Transatlantique, Swedish American Lines, and Wallenius Lines (hereinafter CGT, SAL, and Wallenius). ACL is a corporation whose shareholders are CGT, SAL, Wallenius, and three other shipping companies, but for the purposes of the summary judgment motion it has been stipulated that ACL may be considered a partnership of its six shareholders. ACL's operations are handled from Southampton by its wholly-owned subsidiary, ACL Services, Ltd. The Mont Laurier was owned by a French corporation, Compagnie Atlantique Maritime (all of whose stock was owned by CGT and by Wallenius), was chartered to CGT and Wallenius for, and was operated by CGT in, the Care Line service. By contract dated March 6, 1972 (Exhibit 24 to Holtzberg affidavit in support of ACL's motion for summary judgment) Care Line chartered the weather deck space on all its vessels, including the Mont Laurier, to ACL. Stowage and operation of the vessels was entirely Care Line's responsibility.

Plaintiffs' discovery depositions of the chief executive officer and marine department manager of ACL Services, Ltd. and of Care Line's cargo coordinator, Cdt. Goby, a CGT employee, and the files produced of both organizations establish that ACL had nothing whatsoever to do with the stowage or operation of Care Line vessels. ACL was not even told what Care Line cargo was carried underdeck, much less how it was stowed. In effect ACL was, so far as Care Line vessels were concerned, simply a shipper of containers under a space charter, and so far as concerned the container cargo itself Care Line looked upon ACL as a competing carrier. This situation, of deliberate absence of communication from Care Line to ACL concerning its

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Summary Judgment.*

Care Line cargo operations, can be succinctly, if somewhat inelegantly, characterized: "Does Macy's tell Gimbels?"

The discovery thus negatives any genuine issue as to *actual knowledge* on the part of ACL's management, located in England, as to stowage of Care Line cargo on the Mont Laurier at her Continental loading ports.

There remains, therefore, only the issue of law as to whether the Fire Defense requisite of "*actual fault or privity*" on the part of the carrier—ACL—can be fulfilled by *imputing* Care Lines' knowledge of the stowage to ACL, on the ground that three of the six ACL partners are also the Care Line partners. We submit that the use of the word "actual" to limit the nature of the requisite fault or privity requires that this question be answered in the negative: imputed knowledge does *not* satisfy the requirement.

The courts have been careful in interpreting the Fire Defense not to permit erosion of the very broad protection given the carrier, *Earle & Stoddart v. Ellerman's Wilson Line*, 287 U.S. 420 (1932); *Automobile Insurance Co. v. United Fruit Co., (The Shell Bar)* 224 F.2d 72, 75 (2d Cir., 1955), which is not responsible for loss resulting from fire, "unless caused by the actual fault or privity of the carrier" (Hague Rules, Article II, Section 2). Privity will not be vicariously imputed to the carrier from a stevedore, *A/S J. Ludwig Mowinckels Rederi v. Aceinanto (The Ocean Liberty)*, 199 F.2d 134, 142-4 (4th Cir., 1952) or between a shipowner and a timecharterer, *Verbeeck v. Black Diamond Steamship Corp. (The Black Gull)*, 269 F.2d 68, 273 F.2d 61 (2d Cir., 1959). In the case of a corporate entity the fault must be that of an employee of managerial status, *Craig v. Continental Insurance Co.*, 141 U.S. 638, 646-7 (1891); *Waterman Steamship Corp. v. Gay Cottons (The Chickasaw)*, 414 F.2d 724, 730 (9th Cir., 1969); *The Marguerite*, 140 F.2d 491 (7th Cir., 1944), not

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a crew member or port representative "employed to supervise loading", *Consumers Co. v. Kabushiki Kaisha (The Venice Maru)*, 320 U.S. 249, 252 (1943). Just as the corporate veil cannot be pierced to find privity of a stockholder, in the absence of sham, fraud, or "illegitimate purposes", *Coryell v. Phipps*, 128 F.2d 702, 704 (5th Cir., 1942, *affd.* 317 U.S. 406), so a partnership as a legal entity is not chargeable with a partner's contracts or torts not in furtherance of partnership business, *C.F. Starita Co. v. Comp. Havr. Pen.*, 52 F.2d 58, 61 (2nd Cir., 1931); *Hartigan v. Casualty Co. of America*, 227 N.Y. 175 (1919).

Applying these principles to the undisputed facts in the present case, the question of law becomes: is the knowledge of Goby, Care Line's cargo coordinator—and, therefore, concededly of managerial status in the Care Line partnership—to be imputed to ACL, on the theory that Goby was an employee of CGT, which was both a Care Line partner and an ACL partner? We submit that as a matter of law the question must be answered in the negative. The crucial point is that Goby's knowledge as a Care Line manager is imputed to CGT *as Care Line partner* but not to CGT *as ACL partner*, because Goby performed no managerial function for ACL relating to the Mont Laurier, a Care Line vessel*.

As emphasized above, Goby did not report to ACL concerning Care Line cargoes; ACL was simply the time-charterer of the weather deck space on Care Line vessels. As in the case of any such charter, ACL was entitled to and did rely on Care Line, as operator of the vessels for the proper stowage of their cargoes: "In the carriage of

* Goby was also manager of CGT's Le Havre container terminal, and as such concerned in loading ACL's and other shipping lines' vessels there. This was, however, separate from his duties as cargo coordinator for Care Line vessels at all loading ports, and has nothing to do with the Mont Laurier.

*Application for Decision on Deferred Motions for
Summary Judgment.*

goods under a time charter, absent any special provision or circumstance, the duty to load, stow, and discharge cargo—and the consequences for failing to do so properly—fall upon the ship and her owners.” *Nickimen Co. v. m/v Farland*, 462 F.2d 319, 330 (2nd Cir., 1972); *Munson S.S. Line v. Glasgow Nav. Co.*, 235 Fed. 64 (2nd Cir., 1916). In the absence of any fault or privity on the part of ACL in the stowage of Care Lines cargo in a different part of the vessel, unrelated to the ACL container cargo, the Fire Defense entitles ACL to exoneration from liability as carrier for loss of the on-deck container cargo as a result of fire in the Care Line cargo in the trailer deck.

October 1, 1975

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
By RICHARD G. ASHWORTH
Attorneys for Defendants

Richard G. Ashworth,
Brian D. Starer,
Of Counsel.

Excerpts From Hearing of April 23, 1976.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

New York, New York
April 23, 1976
10:25 A.M.

Before: HON. WHITMAN KNAPP, District Judge.

Appearances:

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, Esqs.,
Attorneys for plaintiffs,
MARTIN B. MULROY, Esq., of Counsel
HAIGHT, GARDNER, POOR & HAVENS, Esqs.,
Attorneys for defendants,
RICHARD G. ASHWORTH, Esq., of Counsel

(2) The Court: This has been before me previously.
Let me see if I correctly understand the situation.

The plaintiff is suing two entities: (a) Atlantic Container Line, and which for purposes of this argument we will assume is a partnership; and (b) Care Lines, which is a partnership made up of the three other defendants.

Altantic Container Line, which we are assuming is a partnership for the purposes of this argument, half of the partners in interest are the same corporations who are the three defendants who make up Care Lines. The other half of the partnership in interest is independent persons.

Excerpts From Hearing of April 23, 1976.

Now, plaintiff's cargo was stored on the weather deck of the ship in question, which weather deck had been space chartered by Atlantic Container Line. There was a trailer deck below the weather deck which was chartered and owned by Care Lines.

Mr. Ashworth: The vessel was owned by a French company, *Compagnie Atlantique Maritime*, which was owned, wholly owned, by two of the Care Line partners, Wallenius and CGT. It was operated by CGT in the Care Line's service.

The Court: For present purposes, we can assume it was owned—the trailer deck was owned by Care Lines?

Mr. Ashworth: Yes, sir.

The Court: The trailer deck was owned by Care (3) Lines. Care Lines was responsible for the stowage of cargo on the trailer deck. That cargo was improperly stored.

Mr. Ashworth: For the purposes of this motion, your Honor.

The Court: Everything I am saying is for the purpose of this motion. That cargo was improperly stored, resulting in a fire which caused the damage to the cargo which is here in issue.

The human being responsible for the stowage on the trailer deck was a fellow named Captain Goby, and insofar as there was human error which caused the fire it was Captain Goby's human error.

Captain Goby was an employee of CGT, one of the Care Line partners, also one of the partners in ACL. However, at the time he was stowing he was acting for CGT in his capacity as a partner of Care Lines. He also, as I understand it, did work for Atlantic Container in LeHavre at other times.

Is that correct?

Mr. Ashworth: That is right.

Excerpts From Hearing of April 23, 1976.

The Court: The issue before me is whether his knowledge and carelessness in this operation can be attributed to Atlantic Container Line. Offhand, I don't see how it can. What do you say?

(4) Mr. Mulroy: Your Honor, the reason his knowledge and carelessness can be attributed to Atlantic Container Line requires that the Court consider as part of the statement of facts that has just been made two additional facts.

Firstly, Care Line was not merely, for purposes of this motion, the owner of the trailer deck, as stated by the Court, but was the charterer-operator of the entire vessel.

The Court: How is that relevant?

Mr. Mulroy: That is relevant from the standpoint of control, your Honor. Otherwise it would appear as though there were some third person who had the overall control of the ship.

Care Line was the operator-charterer of the entire vessel and, therefore, in control of how the ship was to be run and what was to be done with the ship in total.

They space chartered, as the Court stated, the weather deck to ACL, but there was another function that was performed by Captain Goby which the Court did not include in his statement of facts. The Court indicated that Captain Goby performed a function of responsibility to Care Line with regard to the stowage of cargo on the weather deck, but what the Court did not state is Goby was (5) the coordinator of the stowage—

The Court: I didn't understand Care Line had anything to do with the weather deck.

* * *

(6) * * * Mr. Mulroy: ACL from the time of receipt of plaintiffs' cargo owed a continuous, non-delegable duty to plaintiffs' cargo. Now, that's a matter of statute.

Excerpts From Hearing of April 23, 1976.

The Court: If there was a fire it wasn't ACL's problem and that duty didn't apply.

* * *

(7) * * * Mr. Mulroy: The fire is the consequence of the unseaworthiness. I am trying to show your Honor the relationship of the incompatible stowage on the trailer deck jeopardizing the safety of the cargo on the weather deck.

Now, if there is incompatible stowage of cargo in one compartment which is going to destroy cargo in another compartment, I don't see how it can reasonably be said that we are just dealing with one compartment and the rest of the ship makes no difference.

The normal situation that comes up in a maritime case involves the people who issue the bills of lading being charged with the operation of the entire vessel. There are very few cases involving space charters. But when one enters into a space—

The Court: Maybe this will get to the Supreme Court and make law.

Mr. Mulroy: Somehow I doubt it.

Your Honor, there is no basis for suggesting that because there is a space charter that the obligations of a (8) carrier as a carrier to preserve the safety of the cargo doesn't extend to the next deck.

The Court: That is the Care Line.

Mr. Mulroy: The carrier is ACL.

The Court: I thought it was the space charterer.

* * *

Judgment.**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[S A M E T I T L E]

All defendants having moved for summary judgment dismissing the complaint on its merits and defendants Cie Generale Transatlantique, Swedish American Lines, and Wallenius Lines, sued herein as Care Line, having also moved for dismissal of the complaint on the grounds of *forum non conveniens* insofar as it sounds in tort; and this Court having on September 27, 1974 entered its decision and memorandum opinion holding that defendant Atlantic Container Line Ltd. was the carrier and permitting plaintiffs discovery on the limited issue of the carrier's actual fault or privity in the cause of the fire which caused the loss sued upon; and following such discovery it appearing that there is no genuine issue as to the actual fault or privity of defendant Atlantic Container Line Ltd., it is now by the Court

ORDERED AND ADJUDGED that the complaint be and it hereby is dismissed on the merits as against defendant Atlantic Container Line Ltd., and it is further
W.K.

ORDERED AND ADJUDGED that against defendants Cie Generale Transatlantique, Swedish American Lines, and Wallenius Lines, the complaint be and it hereby is dismissed on ground of *forum non conveniens*, on condition that said defendants not interpose the defense of lack of jurisdiction or time-bar by contract or statute of limitations in any suit alleging the same cause of action which plaintiffs or

Notice of Appeal.

any of them may commence against said defendants in Hamburg, Germany, within three months of this judgment becoming final, by expiration of time for or by termination of appeal, and it is further

ORDERED AND ADJUDGED that costs be taxed in favor of defendants against plaintiffs.

Dated: New York, N. Y., May 27, 1976

WHITMAN KNAPP
U.S.D.J.

JUDGMENT ENTERED—6/1/76
RAYMOND F. BURGHARDT
Clerk

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By G. HARBISON
Deputy Clerk

Notice of Appeal.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Notice is hereby given that Normandy Manufacturing Corp., etc., plaintiffs above named, hereby appeals to the United States Court of Appeals for the Second Circuit

Notice of Appeal.

from each and every part of the order dismissing plaintiffs' complaint on the merits as against defendant Atlantic Container Line, Ltd.; dismissing plaintiffs' complaint on the ground of *forum non conveniens* as against defendants Cie. Generale Transatlantique, Swedish American Lines and Wallenius Lines; and taxing costs against plaintiffs, entered in this action on the 1st day of June, 1976.

Dated: New York, New York
June 4, 1976

HILL RIVKINS CAREY LOESBERG & O'BRIEN
By:

s/

MARTIN B. MULROY
Attorneys for Plaintiff
Office and P. O. Address
96 Fulton Street
New York, New York 10038

To:

CLERK OF THE COURT
United States District Court
Southern District of New York
Foley Square
New York, New York

HAIGHT, GARDNER, POOR & HAVENS, Esqs.
Attorneys for Defendants
Office and P. O. Address
One State Street Plaza
New York, New York

Due and timely service of ONE copies
of the within APPENDIX is hereby
admitted this 6TH day of AUGUST 1976

Haight, Gidycz, P. H. H. H.
.....
Attorneys for APPELLERS